CLERK'S COPY.

192

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946

No. 518 29

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, AND ALMERINDO PORTFOLIO, TREASURER OF THE CITY OF NEW YORK, PETITIONERS,

vs.

CARTER & WEEKES STEVEDORING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

LAW

PETITION FOR CERTIORARI FILED OCTOBER 17, 1946.

CERTIORARI GRANTED NOVEMBER 19, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 518

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, AND ALMERINDO PORTFOLIO, TREASURER OF THE CITY OF NEW YORK, PETITIONERS,

vs.

CARTER & WEEKES STEVEDORING COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Order transferring proceeding to Appellate Division	2	1
Notice of application for order transferring proceeding	5	3
Petition	7	4
Final determination of comptroller	16	10
Answer	17	11
Return of Deputy Comptroller	23	14
Tax Return for Year 1937	25	16
Tax Returns for Years 1938, 1939 and 1940	27	17
Comptroller's notice of deficiency tax assessment with schedules	27	17
Letter from petitioner to respondent Comptroller denying liability for additional taxes set forth in deficiency assessment and requesting hearing thereon	30	19
Final determination of Comptroller	31	20
Certification that petitioner has made deposit pursuant to administrative code	32	20

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1945.

	Original	Print
Record on appeal to Court of Appeals of New York—Continued		
Minutes of hearing of June 4, 1943, before Office of Comptroller	35	22
Caption and appearances	35	22
Opening statement for taxpayer	36	22
Testimony of Charles E. Dougherty	41	26
Minutes of hearing of July 30, 1943, before Office of Comptroller	68	47
Caption and appearances	68	47
Testimony of Charles E. Dougherty (recalled)	69	47
Minutes of hearing of September 15, 1943, before Office of Comptroller	90	63
Caption and appearances	90	63
Testimony of Charles E. Dougherty (recalled)	91	63
Recitals as to Petitioner's Exhibits 1 to 5, inc.	97	67
Petitioner's Exhibit 6—Stevedoring contract	98	68
Petitioner's Exhibit 7—Outward Stowage Plan of the S. S. City of Winchester	105	72
Petitioner's Exhibit 8—Inward stowage plan of the S. S. Kaikoura	106	72
Petitioner's Exhibit 9—Invoice rendered by Carter & Weekes to Messrs. Norton, Lilly & Company	107	73
Affidavit of no opinion	108	73
Stipulation waiving printing of Exhibits	109	74
Stipulation waiving certification	110	74
Notice of appeal to the Court of Appeals	111	75
Order of the Appellate Division	113	76
Memorandum opinion of the Appellate Division	115	77
Waiver of certification	116	77
Order substituting attorneys in Court of Appeals	117	77
Stipulation re substitution of attorneys	118	78
Remittitur of Court of Appeals	120	79
Order on remittitur	123	80
Affidavit of regularity	125	81
Judgment of affirmance	127	82
Affidavit of no opinion by Court of Appeals	129	83
Clerk's certificate (omitted in printing)	130	
Order allowing certiorari	131	84

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of The Application of Carter & Weekes Stevedoring Company, Petitioner; For an order against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Statement Under Rule 234

This is a proceeding brought pursuant to Article 78 of the Civil Practice Act to review a final determination by the respondent Comptroller, of New York City Business Tax deficiency for the years 1937 to 1940 (inclusive) and for an order annulling such determination and directing refund of deposit made by petitioner.

This proceeding was commenced on February 24, 1944 by the service of petition and notice of application on Joseph D. McGoldrick and Almerindo Portfolio, Comptroller and Treasurer, respectively, of the City of New York.

The respondents answered the petition on April 19, 1944.

There has been no change in the parties or attorneys herein.

[fol. 2] In Supreme Court of New York, County of New York, Special Term—Part I

Present: Hon. Aaron J. Levy, Justice.

No. 3817/1944

In the Matter of The Application of Carter & Weekes Stevedoring Company, Petitioner; For an order against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Pursuant to Article 78 of the Civil Practice Act

Order Transferring Proceeding to Appellate Division —May 3, 1944

The petitioner, Carter & kes Stevedoring Company, having duly moved this C for an order, among other

[fol. 3] things, transferring these proceedings for disposition to the Appellate Division of the Supreme Court, First Judicial Department,

Now, upon reading and filing the notice of motion herein dated February 24th, 1944, the petition of Carter & Weekes Stevedoring Company verified February 24th, 1944, together with proof of service of a copy of said papers upon the respondents, in support of said motion, and upon reading and filing the answer of the respondents, Joseph D. McGoldrick as Comptroller of the City of New York, and Almerindo Portfolio as Treasurer of the City of New York, verified April 19th, 1944, and the return of said respondents bearing date the 19th day of April, 1944, and after hearing Edwin V. Hellawell, attorney for the petitioner, in support of the application, and Ignatius M. Wilkinson, Esq., Corporation Counsel, Samuel J. Warms, Esq., of counsel, attorney for the respondents, consenting to the granting of the motion to the extent hereinafter provided, and after due deliberation having been had thereon,

Now, on motion of Edwin V. Hellawell, attorney for the petitioner, it is

Ordered, that the instant application be and the same hereby is granted to the extent of directing that the proceeding initiated by the petition of Carter & Weeks Stevedoring Company verified February 24th, 1944, be transferred for disposition to a Term of the Appellate Division of the Su-

[fol. 4] preme Court to be held in and for the First Judicial Department, and that all questions relating to assessment of respondent, Joseph D. McGoldrick as Comptroller of the City of New York, against petitioner, in the sum of $2,352.75, be referred to said Appellate Division for disposition, and it is further

Ordered, that a complete printed record of the proceedings before the respondent, Joseph D. McGoldrick as Comptroller of the City of New York, and of the proceedings upon this application, be filed in said Appellate Division in accordance with its rules, in order that it may review the matters at issue herein in accordance with Section 1296 of the Civil Practice Act.

Enter.

A. J. L., J. S. C.

[fol. 5] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same Title]

NOTICE OF APPLICATION

Please Take Notice that on the annexed petition of Carter & Weekes Stevedoring Company, verified February 24th, 1944, the undersigned, pursuant to Article 78 of the Civil Practice Act, will move this Court at a Special Term, Part I thereof, to be held in and for the County of New York at the County Courthouse, Foley Square, New York, New York, on the 6th day of March, 1944, at 10:00 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard,

(1) for an order by this Court transmitting the complete record of this proceeding to the Appellate Division, First Department, for a review of the determination of respondent, Joseph D. McGoldrick, Comptroller of the City of New York, referred to in the aforesaid petition, or

(2) in the alternative, for an order by this Court annulling or correcting said determination and directing the refund with interest of the sum of $2,352.75 deposited with the City Treasurer of the City of New York, together with costs and disbursements, and granting petitioner such other and further relief as may be just.

[fol. 6] Please Take Further Notice that, pursuant to Section 1291 of the Civil Practice Act, you are required to serve at least two days prior to the return day of this motion a verified answer, annexing thereto a certified transcript of the record of proceedings subject to review or consideration and any and all affidavits or other written proof to be used herein.

Dated, New York, N. Y., February 24th, 1944.

Yours etc., Edwin V. Hellawell, Attorney for Petitioner, Office & P. O. Address, 70 Pine Street, Borough of Manhattan, City of New York.

To: Joseph D. McGoldrick, Esq., Comptroller of the City of New York, Municipal Building, New York, New York; Almerindo Portfolio, Esq., Treasurer of the City of New York, Municipal Building, New York, New York.

[fol. 7] IN SUPREME COURT OF NEW YORK,
COUNTY OF NEW YORK

[Same Title]

PETITION

To the Supreme Court of the State of New York:

The petition of Carter & Weekes Stevedoring Company respectfully shows to the Court and alleges:

1. At all times herein mentioned, petitioner was and is now a corporation organized under the laws of the State of West Virginia, duly authorized to conduct business in the State of New York, and with an office and place of business at 2 Broadway, in the Borough of Manhattan, City of New York, and was at all such times and still is engaged in the general stevedoring business.

2. At all times herein mentioned, respondent, Joseph D. McGoldrick, was and is now the Comptroller of the City of New York, and respondent, Almerindo Portfolio, was and is now the Treasurer of the City of New York.

3. That pursuant to the authority of Chapter 873 of the Laws of the State of New York of 1934, as amended, the Council of the City of New York adopted Local Laws known [fol. 8] as a "Business Tax" or a "Gross Receipts Tax," and which are as follows:

Local Law No. 22 of the Year 1937
Local Law No. 20 of the Year 1938
Local Law No. 103 of the Year 1939
Local Law No. 78 of the Year 1940

all of which Local Laws imposed a tax measured by gross receipts for the privilege of carrying on or exercising for gain or profit within the City of New York, any trade, business or commercial activity, and which Local Laws provided for filing of tax returns for the years in question.

4. That pursuant to such Local Laws and on or before the day of each of the years specified therein for filing tax returns showing gross receipts for the years 1937, 1938, 1939 and 1940, namely, on or before June 15th of each of the years 1938, 1939, 1940 and 1941, respectively, petitioner

filed with the Collector of the City of New York returns showing its entire gross receipts for the calendar years 1937, 1938, 1939 and 1940, respectively.

5. It was shown by each of such returns filed by petitioner that a small amount of the total gross receipts of petitioner for each of the years stated (and which amount was stated therein) was not received for the loading and unloading of vessels in interstate and foreign trade and commerce. As to such receipts, petitioner in each of such years paid a tax to the Collector of the City of New York at the rate specified in such Local Laws.

[fol. 9] It was further shown by such returns that the balance of petitioner's gross receipts (the amount of which was stated) for each of the years stated was derived from the loading and unloading of vessels in foreign and interstate commerce, and as to this portion of such gross receipts petitioner did not pay a business tax and stated in each of its returns that the reason for its not doing so was that such receipts are not subject to local taxation.

6. That subsequently and on or about the 14th day of August, 1942, the Comptroller of the City of New York notified petitioner of a business tax deficiency in the amount of $1,828.97, which purported to be the business tax (with interest and penalty to the time of such notification) on that part of the gross receipts of petitioner which were derived from loading and unloading of vessels in foreign and interstate commerce for the years 1937, 1938, 1939 and 1940, and as to which portion of such gross receipts petitioner had, as aforesaid, claimed in its tax returns for each of such years that it was not subject to such local taxation.

7. Subsequent to the receipt of such notice of tax deficiency and pursuant to the provisions of law, and within the period required thereby, petitioner requested the Comptroller of the City of New York to grant a hearing in connection with such tax deficiency.

8. Thereafter, hearings were held before an officer representing the Comptroller on June 4th, 1943, July 30th, 1943 and on September 15th, 1943.

[fol. 10] 9. Petitioner adduced testimony and evidence in support of its application to cancel such deficiency and to annul the tax with interest and penalty thereon. No testi-

mony or evidence was offered or submitted by the Comptroller of the City of New York.

10. By letter dated February 10th, 1944, the Comptroller of the City of New York communicated to petitioner his decision by which said Comptroller finally and irrevocably determined petitioner's total business tax for the years 1937, 1938, 1939 and 1940 in the amount of $1,594.54, with penalty and interest of $758.21, a total of $2,352.75. A true and correct copy of such final determination is annexed and made a part hereof.

11. That petitioner has paid to the City of New York such general business tax on all its receipts derived from all its activities during the years 1937, 1938, 1939 and 1940, other than receipts derived from loading and unloading of vessels in foreign and interstate commerce.

12. The operations of petitioner which resulted in the gross receipts involved herein can be summarized as follows:

Petitioner as contracting stevedore, is engaged by ship owners to load or unload vessels either destined to or arriving from a foreign port or ports, or destined to or arriving from ports in States other than in the State of New York. Petitioner does not load or unload vessels engaged in intrastate commerce. 95% of the vessels loaded or unloaded by petitioner are engaged in foreign trade and 5% [fol. 11] of the vessels so loaded or unloaded are engaged in interstate trade or commerce.

In loading a vessel, petitioner's first step is the securing of a plan showing the length, beam and draft, the deadweight and gross tonnage of the vessel, and the number, location and dimensions of each cargo hold or other spaces where cargo is to be stowed. Petitioner also ascertains the location of hatches, bulkheads and stanchions leading to or contained in each cargo hold, and that of fuel and water tanks, and the places for stowage of ship's stores and their various capacities. The capacity of the ship's winches and booms must also be learned:

All of the foregoing are important factors, since from such facts must be determined by petitioner the placing within the ship of the various classes of cargo to be loaded.

Another important factor that petitioner must consider at the outset in stowage of cargo is the effect which the con-

sumption of ship's stores and of contents of fresh water and fuel tanks during the voyage will have on the stability and general seaworthiness of the vessel during its voyage.

The nature of the cargo to be stowed is next learned and if the vessel is to stop at more than one port of call, the cargo destined to each port must be ascertained so that cargoes to be delivered at the first port of call will be available for discharge without disturbing cargo destined to a succeeding one.

The weight by volume of the various classes of cargo and the nature of the cargoes to be loaded is learned so that the weight may be distributed in such a manner that [fol. 12] the trim of the ship will render her seaworthy at the offset and throughout the voyage.

In conducting stevedoring operations, petitioner has in its employ, in addition to its executives, a superintendent in charge of each ship, foremen, hatch tenders, longshoremen, timekeepers, carpenters and winchmen.

Before petitioner's operations are commenced, the cargo to be loaded has already been delivered by others and has been placed by them on the dock of the steamship company as near as convenient to the side of the vessel.

The ships to be loaded are equipped with booms, usually four in number, attached to both forward and after masts, and usually adjacent to the cargo hatches. From these booms are suspended steel cables running through a block to the end of which a large hook is fastened. The cables running through a series of blocks are run on to the drum of a winch. Winchmen and others in the employ of petitioner operate such tackle.

What is known as a "draft," or collection of cargo, is made up on the dock by petitioner's employees and enclosed in slings. These slings are engaged by the hook at the end of the tackle mentioned and, on a signal from one of petitioner's employees, the cargo is raised by the tackle and winches and carried overhead to a point over the hatch to be loaded where, on further signal, it is lowered through the hatch into the ship's hold. Longshoremen in petitioner's employ in the hold of the vessel stow the cargo.

A large proportion of petitioner's services are performed in the hold or on other portions of the vessel to be loaded. [fol. 13] The entire balance of the services rendered by petitioner are performed on the dock at a point convenient to the side of the ship.

The unloading of a vessel follows a course that is the reverse of the foregoing.

This work is completely done by petitioner's own employees who are controlled and directed by petitioner's supervisory employees.

In loading a vessel the services never commence at any place other than at a convenient point near the side of a vessel and end in the hold of the vessel. In unloading a vessel, the services commence in the hold and end at a convenient point alongside the vessel on the dock.

13. The action of the Comptroller in making such final determination of business tax deficiency was unjust, erroneous and contrary to law for the following reasons, among others:

(1) The operations of petitioner resulting in its gross receipts on which the Comptroller has determined tax liability constitute foreign and interstate commerce, and the action of the Comptroller is an attempt to levy on such commerce.

(2) The Enabling Act, Chapter 873, Laws of 1934, as amended, and the Local Laws enacted by the City Council, do not authorize the City of New York to levy a tax upon the gross receipts received by petitioner for the services rendered by it and which are described herein.

(3) If such Enabling Act, as amended, and Local Laws of the City of New York purported to authorize the im- [fol. 14] position of said tax with respect to petitioner's gross receipts involved herein, said Act and the Local Laws pursuant to which the tax was levied, are unconstitutional and invalid for the following reasons:

(a) Said laws are unconstitutional and in violation of Article I, Section 8, Clause 3 of the Constitution of the United States.

(b) Said laws are unconstitutional and in violation of the Fourteenth Amendment of the Constitution of the United States.

(c) Said laws are unconstitutional and in violation of Article I, Section 10, Clause 2 of the Constitution of the United States.

(4) As to petitioner, said laws are unconstitutional and invalid as an unlawful interference with the paramount power of Congress over navigation upon the navigable waters of the United States.

14. That heretofore and on the 24th day of February, 1944, and pursuant to provisions of law wherein it is required that before petitioner shall be entitled to review the final determination of the Comptroller with respect to such business tax deficiency, petitioner shall deposit with the Treasurer of the City of New York the amount so finally determined, petitioner deposited with the Treasurer of the City of New York the sum of $2,352.73, the amount of the tax deficiency as determined by the Comptroller of the [fol. 15] City of New York. That on the said 24th day of February, 1944, petitioner filed with the Comptroller of the City of New York an undertaking in the sum of $500.00, executed by Travelers Indemnity Company and approved by a Justice of the Supreme Court, to the effect that if this proceeding be dismissed or the tax shown by the final determination of the Comptroller confirmed, that petitioner will pay all costs and charges which may accrue in the prosecution of these proceedings.

15. No previous application for the relief sought herein has been made.

Wherefore, petitioner prays (1) that an order be made by this Court transmitting the complete record of this proceeding to the Appellate Division, First Department, for a review of the determination of respondent, Joseph D. McGoldrick, Comptroller of the City of New York, referred to in the aforesaid petition, or (2) in the alternative, for an order by this Court annulling or correcting said determination, and directing the cancellation of such tax deficiency and the refund with interest of the sum of $2,352.74 heretofore deposited by petitioner with the Treasurer of the City of New York, together with costs and disbursements, and granting petitioner such other and further relief as may be just.

Carter & Weekes Stevedoring Company, by Charles E. Dougherty, President.

(Verified by C. E. Dougherty, February 24, 1944.)

[fol. 16] FINAL DETERMINATION OF COMPTROLLER, ANNEXED TO PETITION

The City of New York
Bureau of Excise Taxes
350 Broadway, New York

In Reply Refer to: Final Determination R-201 h 7/42.

Carter & Weekes Stevedoring Co., A-11-13 Produce Exchange, New York, N. Y.

Date Feb. 10, 1944.

In Re: Business Tax. Audit No. FB 14602. Reg. No. M 133438. Name Carter & Weekes Stevedoring Company. Address A-11-13 Produce Exchange, New York, N. Y. O. D. $1,828.97.

GENTLEMEN:

The Comptroller of the City of New York pursuant to Chapter 41 of the Administrative Code hereby gives notice that there is due and payable to the City of New York a Business Tax Deficiency in the amount of $2,352.75 for the period from 1/1/37 to 12/31/40 as set forth below.

Summary of Deficiency

Period	Tax	Penalty Interest	Total
1937	410.49	249.58	660.07
1938	359.50	201.32	560.82
1939	362.12	159.33	521.45
1940	462.43	147.98	610.41
Totals Due	1,594.54	758.21	2,352.75

[fol. 17] This determination is final and irrevocable. Additional interest accrues at the rate of 1% per month unless payment is received within ten (10) days. Failure to remit promptly will cause the Treasurer of the City of New York to issue and docket a warrant as provided by the law governing "Proceedings to recover tax."

Make your remittance to the City Collector. In order to obtain proper credit for payment, please enclose a copy of this notice.

Very truly yours, (Signed) George Marlin, Special Deputy Comptroller.

SW:ag. 10/6/43.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same Title]

ANSWER

The respondents, by Ignatius M. Wilkinson, Corporation Counsel of the City of New York, their attorney, for their verified answer to the petition herein, upon information and belief, respectfully:

[fol. 18] 1. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the petition numbered "1", "4" and "11", but respectfully refer to the transcript of the record of the proceedings had before the Comptroller of the City of New York, for the evidence produced by the petitioner as well as other matter, relating to the said allegations of the petition, and for the legal effect thereof.

2. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "5", except that they admit that the petitioner filed returns and paid to the Collector of the City of New York taxes appearing due thereon, on only a portion of its gross receipts for each of the years 1937, 1938, 1939 and 1940, and that it claimed that the balance thereof was not subject to local taxation, but respectfully refer to the transcript of the record of the proceedings had before the Comptroller of the City of New York for the evidence relating thereto, submitted by the petitioner.

3. Deny the allegations contained in the paragraph of the petition numbered "6", except that they admit that on or about the 14th day of August, 1924, the Comptroller of the City of New York notified the petitioner of a business tax deficiency in the amount of $1,828.97 for taxes measured by petitioner's gross receipts during the calendar years 1937, 1938, 1939 and 1940.

4. Deny the allegations contained in the paragraph of [fol. 19] the petition numbered "9", except that they admit that the petitioner produced evidence in connection with its application to annul the said business tax deficiency, together with the interest and penalties thereon.

5. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "12", and respectfully refer to the transcript of the testimony given before the Comptroller of the City of New York, for the evidence given by the petitioner, relating to the substance of the said allegations, and for the legal effect thereof.

6. Deny the allegations contained in the paragraph of the petition numbered "13".

As and for a Statement of the Grounds upon Which the Comptroller Acted in Making the Determination Complained of, the Respondents Further Allege, upon Information and Belief:

7. That between July 1, 1937 and June 30, 1941, the petitioner was engaged in and carried on within the City of New York, a business as defined in the local laws here in question, for gain and profit. By virtue of the fact that the petitioner was engaged in business as aforesaid in the City of New York, it became subject to the tax measured by its gross receipts or income, imposed by Local Laws 22 of 1937, 20 of 1938, 103 of 1939, and 78 of 1940.

8. That on or about August 14, 1942, the respondent, the [fol. 20] Comptroller of the City of New York, served upon the petitioner a written notice of a deficiency of business tax, with schedules attached, under Local Laws 22 of 1937 as amended, 20 of 1938, 103 of 1939 and 78 of 1940, for the annual privilege periods embraced within the period between July 1, 1937 and July 1, 1941, under said local laws in the amount of $1,594.54, besides penalties and interest amounting to $751.21, or in the aggregate amount of $2,352.75, and covering the annual calendar measuring periods comprised within the period from January 1, 1937 to December 31, 1940, inclusive.

9. That thereafter and on or about August 19, 1942, the petitioner made application for a hearing with respect to said deficiency assessment.

10. That thereafter and on June 4th, September 15th, and July 30th, 1943, hearings were duly held before the Comptroller of the City of New York, pursuant to the provisions of the local laws in question.

11. That thereafter and on or about February 10, 1944, the Comptroller of the City of New York made a final determination that there was due and payable from the petitioner to the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, the business tax deficiency of $2,352.75, of which the sum of $1,594.54 represented the tax, and the sum of $758.21 represented interest and/or penalties.

12. That annexed hereto and made a part of this answer [fol. 21] is a duly certified transcript of the record of the proceedings had before the Comptroller, mentioned in the petition herein, and subject to review or consideration in this proceeding.

13. That the evidentiary facts upon which the determination of the respondent, the Comptroller of the City of New York, was based, are set forth and contained in the certified transcript of the record of the proceedings, the minutes of the testimony taken at the hearings, the written documents introduced in evidence at the hearings, and all the correspondence and other documents relating to and supporting the determination of the said respondent, the Comptroller of the City of New York. The said evidentiary facts show that there was competent proof of all of the facts necessary to be proved in order to authorize the making of the determination by the said respondent.

14. That the determination of the respondent, the Comptroller of the City of New York, complained of by the petitioner in this proceeding, is in conformity with the law and the facts contained in the aforesaid record of the proceedings had before the Comptroller, annexed hereto and made a part hereof.

15. That this proceeding requires the determination of questions relating to the sufficiency and weight of evidence submitted to the Comptroller, within the purview of subdivisions 6 and 7 of § 1296 of the Civil Practice Act, and, hence, unless the petition is dismissed as a matter of law, this proceeding is a proper one to be transferred for disposition to a term of the Appellate Division, First Department.

[fol. 22] Wherefore, the respondents pray for an order herein dismissing the petition, or if this be denied, then in the alternative, for an order directing that the instant

proceeding be transferred for disposition to a Term of the Appellate Division, First Department; and for a final order dismissing the proceeding on the merits, and for such other and further relief as to the Court may seem just and proper, together with the costs of this proceeding.

Dated: April 18, 1944.

Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York.

(Verified by A. McK. Sylvester, Apr. 19, 1944.)

[fol. 23] In Supreme Court of New York, County of New York

[Same Title]

Return

To the Supreme Court of the State of New York:

Alvin McK. Sylvester does hereby certify this transcript of the record of the proceedings herein, consisting of all and singular his ruling and assessment in the premises, together with his proceedings, decisions, determinations and actions, and all and singular the evidence, documents, records and all other papers before him or which were submitted to him relative to or concerning his determination to tax against the petitioner pursuant to Local Laws Nos. 22 of 1937, as amended, 20 of 1938, 103 of 1939 and 79 of 1940.

1. Petitioner's sworn returns of business tax due pursuant to the local laws herein involved.

2. Notice, dated August 14, 1942, from the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, advising petitioner of business tax deficiency assessments of $1,829.97, together with the schedules annexed thereto computing said deficiency.

3. Letter from the petitioner to the respondent, Joseph [fol. 24] D. McGoldrick, as Comptroller of the City of New York, denying liability for the additional taxes

set forth in the deficiency assessment, and demanding a hearing on the determination with respect thereto.

4. Minutes of hearings held pursuant to said request on June 4, 1943, September 15, 1943 and July 30, 1943, together with all exhibits received in evidence or for identification at said hearings.

5. Notice of final determination, dated February 10, 1944, rendering final notice of deficiency assessment.

6. Undertaking, dated February 23, 1944, executed by the Travelers Indemnity Company and approved as to form and sufficiency by Hon. Kenneth O'Brien, a Justice of the Supreme Court of the State of New York.

7. A statement of the Assistant Deputy City Collector, dated February 25, 1944, certifying that the petitioner deposited with the Treasurer of the City of New York the sum of $2,352.75 on February 24, 1944, as a condition precedent to the institution of this proceeding.

This return is based upon the records, proceedings and papers on file in the office of the Comptroller of the City of New York.

In Witness Whereof, the Deputy Comptroller of the City of New York has hereunto set his hand this 19th day of April, 1944.

Alvin McK. Sylvester, Deputy and Acting Comptroller of the City of New York.

(Here follow 2 photolithographs, side folios 25-26)

TAX RETURN FOR YEAR 1937
(Referred to in Foregoing Return)

Form 30 B

The City of New York

Department of Finance

EMERGENCY REVENUE DIVISION

THIS TAX IS DUE AND PAYABLE JUNE 1938

RETURN OF EXCISE TAX ON GROSS RECEIPTS

Pursuant to Local Law No. 20 of 1935, as amended

Local Law No. 21 of 1937, as amended, imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment

GROSS RECEIPTS FOR THE CALENDAR YEAR 1937

or Period Began ____ 193__ and Ended ____ 193__

A period other than the calendar year 1937 to be used only by a person starting business after January 1, 1937 as set forth in Section 3 (c) of the law (See Instruction Sheet).

Page 1

ORIGINAL

File Code

M 133438

Payment Code

MAKE CHECKS PAYABLE TO CITY COLLECTOR

Send this Return with Remittance On or Before June 15, 1938 to One of the Borough Offices of the Bureau of City Collections indicated on the Reverse Side Hereof

(This Space for Name and Address Only)

CARTER & SEEKS STEVEDORING B-31867
A-11-13 PRODUCT EXCH CO
NEW YORK N Y

U.S. 2/14/43pc

ANSWER ALL QUESTIONS ON REVERSE SIDE HEREOF

KIND OF BUSINESS _____

DATE BUSINESS COMMENCED _____

MAKE CHECKS PAYABLE TO CITY COLLECTION

Line and Instruction Number	GROSS RECEIPTS		
1.	Receipts from sales in trade or business (Less Sales returned)		
2.	Less—Net receipts from sales in interstate commerce		
3.	Net receipts from sales in foreign commerce		
4.	Total (Items 2 and 3)		
5.	Net receipts from sales in trade or business (Item 1 minus Item 4)		
6.	Receipts from production or operation		
7.	Receipts from [illegible]		598 89
8.	Receipts from dividends on stocks of domestic and foreign corporations		375 00
9.	Receipts from royalties		
10.	Receipts from premiums from the business of insurance in the City of New York		
11.	Other receipts from commercial or business transactions (Explain in Schedule A)		
12.	Total gross receipts to be used as a measure in computing the tax (Items 5 to 11 inclusive) *(If this return is for a period less than one year compute the tax as indicated below)*		1 250 00
13.	Tax due the City of New York (1/10 of 1% of Item 12)		1 25
14.	Penalties (See Instruction Sheet)		
15.	Total tax and penalties (Items 13 and 14)		1 25

COMPUTATION OF TAX BASED ON A RETURN FOR A PERIOD LESS THAN ONE YEAR (SEE INSTRUCTION SHEET)

16.	Total gross receipts (Item 12)		
17.	Number of days covered by this return (Period shown above)	Days	
18.	Total gross receipts for a year (same basis) to be used as a measure in computing the tax (Item 17 multiplied by 365 and the product thereof divided by Item 16)		
19.	Tax due the City of New York (1/10 of 1% of Item 18)		
20.	Penalties (See Instruction Sheet)		
21.	Total tax and penalties (Items 19 and 20)		

AFFIDAVIT

I swear (or affirm) that this return of gross receipts, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 9 of 1937, as amended, and the rules issued under authority thereof.

Sworn to and subscribed before me this 26th day of June 1940

Carter & Woolsey Shipbuilding Co.

Name of Business or Individual

By J. T. Arnold Treas.

Signature of officer, member, etc.

My commission expires March 30, 1941

Title

This space is for Departmental use only

C.B. 8 Folio 236

MAKE CHECKS PAYABLE TO CITY COLLECTOR

Cashier's Stamp

Corporation checked by _____ Date _____

Return mailed to _____

JUN 28 39 E90670 RECORDED Cash ——— ———0000000125

164

Tax Return for the Year 1937.
(Reverse Side)

Form 38B. Page 2

SCHEDULE A
DETAILS OF ITEM 12, PAGE 1, OF RETURN

EXPLANATION	Amount
	$

SCHEDULE B

ENTER HEREINBELOW ALL GROSS RECEIPTS NOT INCLUDED ON PAGE 1, OF RETURN

Nature of Receipt	Reason for Exclusion from Gross Receipts	Amount
The entire business consists of loading and unloading interstate commerce, and under the decision of the United States Supreme Court in the case of Puget Sound S. S. Co. V. Tax Commission of the State of Washington, et al., 58 Supreme Court Reporter, p. 72, the United States Court has held that such receipts are not subject to local tax, being income derived from foreign trade.		$

ANSWER ALL OF THE FOLLOWING QUESTIONS

The books of the taxpayer are in care of C. L. Smith, Treasurer

Located at 2-8 Broadway, New York City.

Was a return filed under Local Law No. 29 of 1936? YES

If so, under what name and address was the previous return filed? Under same name and address

Is this business in any way an outgrowth, result, continuation or reorganization of a business or businesses in existence prior to the date shown on Page 1? If answer is "yes" give name and address of such predecessor business and the date of the change in entity.

Was the present business discontinued prior to June 30th, 1938?

If so, state date operations ceased

Was the business legally dissolved? Date

Remarks

LOCATION OF BOROUGH OFFICES OF THE BUREAU OF CITY COLLECTIONS

BOROUGH	ADDRESS
MANHATTAN	ROOM 160, MUNICIPAL BUILDING
THE BRONX	TREMONT AVE. AND ARTHUR AVENUES
BROOKLYN	ROOM 1, MUNICIPAL BUILDING
QUEENS	COURT SQUARE, LONG ISLAND CITY
RICHMOND	ROOM 12, BOROUGH HALL, ST. GEORGE, S. I.

[fol. 27] TAX RETURNS FOR YEARS 1938, 1939 AND 1940 (REFERRED TO IN FOREGOING RETURN)

Omitted by Stipulation, see page 109.

COMPTROLLER'S NOTICE OF DEFICIENCY TAX ASSESSMENT WITH SCHEDULES (REFERRED TO IN FOREGOING RETURN)

Hearing Unit, Room 512.

Notice of Determination

A-21 7/42

Carter & Weeks Stevedoring Co., A-11-13 Produce Exchange, New York City.

Application Letter No. 6769

Date Aug. 14, 1942.

In Re: Business Tax Audit No. FB-14602. Reg. No. M-133438. Name —. Address —.

GENTLEMEN:

The Comptroller of the City of New York pursuant to Chapter 41 of the Administrative Code hereby gives notice of a determination of a Business Tax Deficiency together with penalties and/or interest to date amounting to $1,828.97 for the period from 1/1/37 to 12/31/40 as set forth below.

[fol. 28]

Summary of Deficiency

Period	Tax	Penalty Interest	Total
L. L. #22 of 1937	410 49	98 52	509 01
20 of 1938	359 50	64 71	424 21
103 of 1939	362 12	43 4	
78 of 1940	46		
Totals Due	1594 54	234 43	1828 97

Additional interest accrues at the rate of 1% per month in accordance with the provisions of said chapter unless payment is received within ten (10) days. Please enclose a copy of this notice in order to obtain proper credit for payment when making your remittance to the City Collector.

In the event that you do not agree with this determination, the law provides that an application in writing for a hearing must be made to the Comptroller within thirty (30) days of the date of this notice. Otherwise, this termination shall finally and irrevocably fix the tax.

Very truly yours, George Marlin, Special Deputy Comptroller.

VFK. MB 8/11/42.

[fol. 29]

A-502a 1/40

EXHIBIT "A"

The City of New York

EMERGENCY REVENUE DIVISION

50 Lafayette Street
New York, New York

Business Tax Summary Deficiency Statement

Page No. .....
Audit No. FB-14602
Reg. No. M-133438
Code No. 1970
Pay. No. 5RA
Date Aug 14 1942

Carter & Weeks Stevedoring Co.
Taxpayer

A-11-13 Produce Exchange, New York City
Address

Explanation	L. L. 22 of 1937 Period Ending 12/31/37	L. L. 20 of 1938 Period Ending 12/31/38	L. L. 103 of 1939 Period Ending 12/31/39	L. L. 78 of 1940 Period Ending 12/31/40
	Total Adjusted Taxable Receipts			
Additional Receipts Services Rendered.....	410,486.04	359,498.18	362,120.90	462,432.98
Total Additional Taxable Receipts.....	410,486.04	359,498.18	362,120.90	462,432.98
Net Taxable Receipts Reported.....	1,250.00	1,543.77	1,254.79	1,346.63
Total Adjusted Taxable Receipts.....	411,736.04	361,041.95	363,375.69	463,779.61
Tax @ 1/10 of 1%.....	411.74	361.04	363.37	463.78
Total Tax Due City of New York.....	411.74	361.04	363 37	463.78
Less Tax Paid City of New York.....	12.25	1.54	1.25	1.35
Balance of Tax Unpaid..	410.49	359.50	362.12	462.43
Penalties and/or Interest to Date.....	98.52	64.71	43.45	27.75
Tax Deficiency.....	$509.01	$424.21	$405.57	$490.18

Total Tax Deficiency $1,828.97. Make Checks Payable to City Collector.

[fol. 30] LETTER FROM PETITIONER TO RESPONDENT COMPTROLLER DENYING LIABILITY FOR ADDITIONAL TAXES SET FORTH IN DEFICIENCY ASSESSMENT AND REQUESTING HEARING THEREON (REFERRED TO IN FOREGOING RETURN)

Telephone BOwling Green 9-2880-2881.
Cable Address "Carterweek".

Members: New York Produce Exchange, New York Maritime Exchange.

Carter & Weekes Stevedoring Co., A 11-13 Produce Exchange, New York

August 19, 1942.

Mr. George Marlin, Special Deputy Comptroller, Bureau of Excise Taxes, 350 Broadway, New York, New York.

Attention Hearing Unit, Room 512, Notice of Determination. A-21.7/42

DEAR SIR:

Receipt is acknowledged of Business Tax Deficiency Notice, dated August 14, 1942 addressed to this company in the sum of $1,828.97 for the period January 1, 1937 to December 30, 1940. In accordance with the privilege ex-
[fol. 31] tended to taxpayers, a hearing is requested, regarding this assessment, to which exception is taken by the taxpayer. If convenient to your office, kindly arrange a date after September 10th, 1942.

Very truly yours, Carter & Weekes Stevedoring Co.,
by C. L. Smith, Treasurer.

CLS/ha.

FINAL DETERMINATION OF COMPTROLLER (REFERRED TO IN FOREGOING RETURN)

(Printed herein at page 16 as part of the Petition.)

[fol. 32] CERTIFICATION THAT PETITIONER HAS MADE DEPOSIT PURSUANT TO ADMINISTRATIVE CODE (REFERRED TO IN FOREGOING RETURN)

The City of New York

Intradepartmental Memorandum

To: Mr. George Marlin, Special Deputy Comptroller.
From: Mr. John W. Allen, Assistant Deputy City Collector.
Division of Special Taxes.
Date: February 25, 1944.
Subject: Carter & Weekes Stevedoring Co.
A 11-13 Produce Exchange, New York City.

This is to inform you that the Carter & Weekes Stevedoring Co. deposited with the Treasurer the sum of $2,352.75 on February 24, 1944; this payment was recorded in Cash Book 13, Folio 266, and has been credited to the escrow account—SMS-72.

This deposit was made pursuant to the provisions of the Administrative Code of the City of New York in order that review of determination by the Comptroller with respect to the Business Tax deficiency for the period January 1, 1937 to December 31, 1940 may be instituted.

A copy of the letter filed by Carter & Weekes Stevedoring Co. at the time o making said deposit is attached hereto for your information.

John W. Allen, Assistant Deputy City Collector.

JWA:ME, Att.

[fol. 33] Copy

Carter & Weekes Stevedoring Co.

A 11-13 Produce Exchange

New York

February 24, 1944.

City Treasurer of the City of New York, Municipal Building, New York City.

In Re: Comptroller's Determination of Carter & Weekes Stevedoring Company Business Tax, Interest and Penalties for the Years 1937, 1938, 1939 and 1940

Dear Sirs:

There is enclosed herewith our certified check in the amount of $2,352.75, which is paid to you as a deposit only, and not as a tax, pursuant to final and irrevocable determination of the Comptroller of the City of New York dated February 10th, 1944, with respect to business tax deficiency of the undersigned with interest and penalties for the years 1937, 1938, 1939 and 1940.

This deposit is made pursuant to the provisions of the Administrative Code of the City of New York in order that review of said determination of the Comptroller can be obtained by us in a court of competent jurisdiction under Article 78 of the Civil Practice Act.

Such determination of the Comptroller was made after hearings conducted by him at which it was shown by testi- [fol. 34] mony and other evidence that the gross receipts upon which such tax was levied were derived from foreign and interstate commerce and are not subject to such local taxation. The levying of such tax, interest and penalties, and such determination of the Comptroller thereon, is in violation of rights assured to us under Article I, Section 8, Clause 3, of the United States Constitution, and other provisions of the United States Constitution, and this deposit is made under protest as being required in violation of such rights.

It is understood by us that if after such court review it is finally found that the determination of the Comptroller, above mentioned, was erroneously, illegally or improperly made, that this deposit shall be returned to us.

Very truly yours, Carter & Weekes Stevedoring Co.,
(Signed) by C. E. Dougherty, President.

[fol. 35] Office of the Comptroller,

Bureau of Excise Taxes

June 4, 1943 Room 517 2 P. M.

In the Matter of CARTER & WEEKES STEVEDORING Co., A-11-13 Produce Exchange, New York, N. Y. (M-133438), Business Tax Deficiency.

Minutes of Hearing of June 4, 1943

Before Solomon Wittenberg, Presiding Officer

For the Comptroller: Jacob Slove, Esq., Assistant Corporation Counsel.

For the Taxpayer: Attorney: Edwin V. Hellawell, Esq., 70 Pine Street, New York, N. Y.

Witness: Charles E. Dougherty, Andover, N. J.

Mr. Wittenberg: This is a formal hearing in connection with a determination by the Comptroller of the City of New York against the Carter & Weekes Stevedoring Company, A-11-13 Produce Exchange, New York City, assessing a [fol. 36] Business Tax covering the period January 1, 1937 to December 31, 1940, in the total sum of $1,828.97, of which $1,594.54 is principal and $234.43 is the interest penalty.

Mr. Hellawell, are you ready to proceed with the hearing?

Mr. Hellawell: Yes.

Mr. Wittenberg: Will you please make an opening statement?

OPENING STATEMENT

Mr. Hellawell: I represent the taxpayer, Carter & Weekes Stevedoring Company, a West Virginia corporation which is engaged in the stevedoring business in the City of New York.

The entire business of this taxpayer other than incidental income is derived from stevedoring services on vessels in foreign, for the most part, and to a lesser part in interstate commerce. The taxpayer in making its returns for each of the years in question, namely 1937, 1938, 1939 and 1940, stated on the returns "the United States Supreme Court has held that such receipts are not subject to local tax". The returns were received by the Comptroller of the City of New York without protest and the taxpayer in each year

in question paid a tax on all of the receipts from its business other than that derived from foreign or interstate trade, which consisted for the most part or almost wholly of interest on bank deposits or from dividends on stock of corporations. Such returns were received without protest and the tax accepted by the Comptroller of the City of New York until during the month of July 1942, specifically, on July 13, 1942, a ruling was made by Mr. George Marlin, Special Deputy Comptroller of the City of New York, reading as [fol. 37] follows "General Business"—heading—"General Business and Financial Tax—Receipts from Stevedoring Operations carried on entirely within the Territorial Limits of the City of New York are to be Included in the Measure of the Tax. Based upon recent United States Supreme Court decisions subsequent to the *Puget Sound* case, the receipts from stevedoring operations carried on entirely within the territorial limits of the City of New York are to be included in the measure of the tax under the General Business and Financial Tax Law. No apportionment is necessary since the measure of the tax is restricted to receipts from activities carried on exclusively within the City of New York. Dated: July 13, 1942. George Marlin, Special Deputy Comptroller". That subsequently and for the first time the taxpayer received a notice of assessment of a tax which was based on receipts from stevedoring performed on vessels in foreign and interstate commerce, and this assessment was received on or about the 14th day of August, 1942.

Mr. Stove: The original assessment, of course, was mailed to the taxpayer and should be available to you.

The assessment as such is automatically a part of the record in this case. However, if for convenience you would like the Comptroller to prepare and produce a copy of the assessment I don't see why—any reason why that can't be done.

I have before me the body of the assessment, that is, the second sheet which gives the detail for the business Tax [fol. 38] Summary Deficiency assessment, which is a copy in the Comptroller's file; the top sheet which is the notice of deficiency determination seems to be missing from the file at this time and if it can be found it will be produced at a subsequent time or a copy substituted.

Mr. Hellawell: I ask that this paper, then, produced by the Comptroller be marked in evidence and a copy of it substituted for this exhibit.

Mr. Slove: No objection.

Mr. Wittenberg: (To stenographer) Mark this Taxpayer's Exhibit 1.

(Received and marked Taxpayer's Exhibit #1 in evidence.)

Mr. Slove: You do concede, Mr. Hellawell, that the taxpayer did receive the notice of deficiency determination in this case.

Mr. Hellawell: We concede that the taxpayer received the original of Exhibit 1.

Mr. Slove: Of Taxpayer's Exhibit 1.

Mr. Hellawell: That's right.

I wish to offer in evidence the return of the taxpayer for the year 1937 which shows a tax liability of $1.25 for receipts exclusive of receipts in the stevedoring business, all of which receipts constituted either foreign or interstate commerce.

Mr. Slove: This again is a document that is automatically a part of the record in this case. However, if you wish that it be marked and identified as an exhibit I have no objection.

Mr. Hellawell: Yes.

Mr. Slove: The Comptroller produces from his file the original return filed by the taxpayer.

[fol. 39] I have no objection to this being marked as an exhibit.

Mr. Wittenberg: (To stenographer) Please mark this Taxpayer's Exhibit Number 2.

(Received and marked Taxpayer's Exhibit #2 in evidence.)

Mr. Hellawell: And with reference to Exhibit Number 2 it is conceded, is it not, Mr. Wittenberg and Mr. Slove, that the $1.25 shown on the face of the return was paid to the City of New York.

Mr. Slove: It appears that the $1.25 was received by the City of New York.

Mr. Hellawell: The next one is 1938. I'd like to have you produce from your files the 1938 return of the taxpayer.

Mr. Slove: You are offering it as an exhibit?

Mr. Hellawell: I am offering it as an exhibit.

Mr. Slove: I have no objection to the taxpayer's return for the year 1938, now in the Comptroller's file, being marked as an exhibit.

Mr. Wittenberg: (To stenographer) Mark this Exhibit 3.

(Received and marked Taxpayer's Exhibit #3 in evidence.)

Mr. Hellawell: And will the same concession be made as to the payment of the $1.54 appearing on the face of the return as a tax liability?

Mr. Slove: Taxpayer's Exhibit 3 seems to bear a notation that the sum of $1.54 was received by the City of New York.

Mr. Hellawell: I ask the City to produce the taxpayer's return for the calendar year 1939, and I offer that in evidence as Exhibit Number 4.

[fol. 40] Mr. Slove: I have no objection to the receipt in evidence of taxpayer's return for the calendar year 1939, now a part of the Comptroller's file.

Mr. Wittenberg: (To stenographer) Mark this as Taxpayer's Exhibit Number 4.

(Received and marked Taxpayer's Exhibit #4 in evidence.)

Mr. Hellawell: I understand the same concession is being made as to the tax in connection with the year 1939, that is, that the $1.25 which is the tax liability shown on the face of the return was paid to the City of New York.

Mr. Slove: It appears on Taxpayer's Exhibit Number 4 in evidence that the sum of $1.25 was received by the City of New York.

Mr. Hellawell: Now I ask the City to produce taxpayer's return for the year 1940.

Mr. Wittenberg: It appears that our auditor had checked on the figure of that return and satisfied himself that the return was filed and a payment made of $1.35.

Mr. Hellawell: You don't have the return in the file?

Mr. Wittenberg: The return is not as yet in the file.

Mr. Hellawell: I ask that this be marked in evidence as a copy of the return for 1940.

Mr. Slove: On your statement, Mr. Hellawell, that this is an exact copy of the return that was filed with the City of

New York for the calendar year 1940 I have no formal objection to the introduction of this paper in evidence.

Mr. Hellawell: It appears in the taxpayer's file as having been an exact copy of the return as filed with the City of New York.

[fol. 41] Mr. Wittenberg: (To stenographer) Will you mark this Taxpayer's Exhibit Number 5.

(Received and marked Taxpayer's Exhibit # 5 in evidence.)

Mr. Hellawell: I ask that the witness be sworn.

CHARLES E. DOUGHERTY, residing at Andover, New Jersey, produced as a witness on behalf of the taxpayer, having been duly sworn, was examined and testified as follows:

Direct examination.

By Mr. Hellawell:

Q. Mr. Dougherty, are you president of the Carter & Weekes Stevedoring Company?

A. Yes.

Q. Have you had prepared under your supervision a statement of the manner in which the stevedoring business is conducted by Carter & Weekes Stevedoring Company?

A. I have.

Q. And I show you this statement and ask you whether that is the statement prepared under your supervision?

A. That is.

(Discussion off the record.)

Q. Mr. Dougherty, will you describe in general the stevedoring business as it is conducted and has been conducted by Carter & Weekes during the years 1936 to 1940 inclusive, your method of operations, the percentage of your work of stevedoring which is devoted to foreign commerce—that is, vessels loaded or discharged which are engaged in foreign [fol. 42] commerce—and the percentage of vessels which are loaded and discharged by Carter & Weekes Stevedoring Company as stevedores which were engaged in interstate commerce during those years, and your connection with the business of stevedoring and with the business of Carter & Weekes Stevedoring Company in particular.

A. I am the president of Carter & Weekes Stevedoring Company, a West Virginia corporation, which is authorized to conduct business in New York State and which has its principal office in the Produce Exchange Annex, Borough of Manhattan, New York City. I have been connected with Carter & Weekes Stevedoring Company for thirty-six years. During that time I have served in the following capacities with that company: clerk, timekeeper, superintendent, secretary and president. For fifteen years I was directly in charge of actual stevedoring operations for our company as superintendent, directing the loading and discharge of vessels. During the last war I was assistant chief stevedore in the Port of Bordeaux with the rank of Captain of Engineers in the United States Army. Among my duties with Carter & Weekes Stevedoring Company for the past twenty years has been the geenral supervision of stevedoring operations which are conducted by employees of our company under the direct supervision of superintendents in our employ who are in charge of each ship. The business of stevedoring conducted by Carter & Weekes Stevedoring Company during the years 1937 to 1940 and in prior years and at present, consists of the following: In loading a ship we first obtain a plan of the vessel showing her length, beam [fol. 43] and draft, her dead weight gross and net tonnage. We also ascertain from this plan the number, location and dimensions of each cargo hold and other cargo spaces such as 'tween deck space, deep tanks and other portions of the vessel in which cargo can be stowed. We also ascertain the location of each hatch, the capacity of the ship's winches and booms and slings, and the location of bulkheads and stanchions in each cargo space, the location of fuel and water tanks, and of portions of the ship set aside for carriage of ships stores. The location and capacity of water and fuel tanks and place for stowage of ships stores is a factor in our business, since fuel, water and stores are consumed on the voyage and the depletion of these stores have an effect on the trim of the vessel. We next ascertain the nature of the cargo to be stowed in the vessel, and if the vessel is to stop at more than one port of call, the cargo which is destined to each port. This is necessary in order that cargoes destined to first and successive ports of call will be available for discharge without disturbing cargo which is destined to a succeeding port of call. We then ascertain the amount of weight by volume of each particular

class of cargo, since it is important that, where possible, heavy cargo be stowed as low in the ship as possible. We must also carefully consider the nature of the cargo as to whether or not it is breakable or otherwise perishable, and other characteristics which would prevent its stowage, for instance, near boilers or under other cargo, etc. We must, in stowage of cargo, follow the rules of the Board of [fol. 44] Underwriters. It is important that the weight be so distributed through the vessel that her trim will be such that she is not only seaworthy at the outset of the voyage, but will remain so after cargo is discharged at her several ports of call and as stores, fuel and water are used. After we have ascertained and considered these and other factors, a stowage plan is prepared and submitted to the ship's master for his approval, and the vessel is made ready to receive her cargo. This tentative stowage plan details where each of the classes of cargo to be loaded into the vessel, shall be stowed. In order to conduct stevedoring operations, we have in our employ, in addition to executives, the following: superintendent in charge of each ship, foremen, hatch tenders, longshoremen, timekeepers, carpenters, engineers or winchmen. When we start our stowage operations the cargo has already been delivered by others and has been placed by them on the dock of the steamship company as near as convenient to the side of the ship. Vessels to be loaded are equipped with booms which are long and heavy poles either of wood or metal and which are attached to their lower end to the mast by a hinge or swivel. Usually there are four of such booms attached to both forward and after masts. To the upper end of these booms steel cables are attached which run through heavy steel blocks and on to the drums of winches which are operated or worked by an engine through steam supplied by a boiler aboard the ship, and an engineer or winchman in our employ is in charge of each of these winches. What is known as a "draft," or a [fol. 45] large collection of cargo, is made up on the dock within the scope or reach of the ship's boom. In some classes of cargo, this is collected together in what is known as a "cargo net" made of either manila or steel wire rope, and in other cases wire rope slings are used. In either case, the vessel's booms are spotted, one over the pile of cargo on the dock, and one over the ship's hatch leading to the part of the ship to be loaded, connected by two falls married with one hook. A hook attached to a heavy block and

fall is attached to the cargo net, or the straps, and on a signal from the gangway man or hatch tender, the winchmen in charge of the winches raise the draft so that it is to a point on the dock above the side of the vessel and is then swung until it hangs over the hatch leading to a cargo hold of the ship. On a further signal from the hatch tender, the winchmen lower the draft into the hold of the ship. Longshoremen in our employ make up the draft on the dock and other longshoremen in our employ located in the hold of the ship unhook the cargo net or sling when the draft has reached the hold which has been predetermined as its place of carriage. The longshoremen in our employ, in the hold of the vessel, then stow the cargo in the hold under the direction of another foreman in a manner so that such cargo will not shift during the voyage. The entire ship is thus loaded in accordance with the stowage plan. In some cases it is necessary, where large pieces of cargo are to be loaded, to use the services of carpenters in our employ to build bulkheads or to brace and truss heavy [fol. 46] pieces of cargo with wooden beams or other lumber. Most of our services are performed in the hold and on other portions of the vessel itself. The entire balance of our services are performed on the dock at a point as convenient as possible to the side of the vessel. The vessel must be loaded in such a manner that her trim or stability is maintained at all times. There is only one other function of the business of stevedoring as we conduct it. That is the discharge or unloading of a vessel. This operation is the exact reverse of the loading operation previously described. In the operation of discharge, the cargo is removed from the holds of the vessel by the vessel's slings attached to its booms and deposited at a convenient point on the dock where it can be removed by others. Ninety-five per cent. of the vessels that were loaded and discharged by our company during the years 1936 to 1940, inclusive, were destined to or arrived from foreign countries. All of the stevedoring services performed on such vessels constituted foreign commerce. The balance of the vessels loaded or discharged by us during the years 1936 to 1940, inclusive, were engaged in interstate trade and our work thereon was interstate commerce. None of the ships upon which stevedoring services were performed by us during said years were engaged in intra-state trade. In doing this work we contract with steamship companies to load and discharge

vessels in their ownership, and this work is completely done by our employees whom we control and direct to work ourselves through supervisory employees. All of the ves-
[fol. 47] sels as to which our work is done are engaged exclusively in interstate or foreign commerce. Any serious interruption in the service we perform impairs the activity of a port or would slow down and obstruct the free and steady flow of commerce. It is necessary that our work be done expeditiously so that the facilities for such interstate and foreign commerce and the ships engaged in such commerce can be operated at a maximum of efficiency. We at all times during the years 1936 to 1940 had an adequate and competent force of highly skilled men and equipment to do this work so that the loading and discharging of vessels was not delayed. The cost of our work is absorbed by the vessel and is covered by the freight bill of the carrier, and our billings for services are always made to the steamship owner. Our services never commence any place other than at a convenient point near the side of a vessel and end in the hold of the vessel in loading a vessel, and in discharging a vessel our services commence in the hold and end at a convenient point alongside of the vessel on the dock. All of our stevedoring contracts are uniform in that they include the complete loading or discharging of a vessel in the manner herein referred to. Stevedoring services are highly specialized, and call for the exercise of skill and knowledge of many factors which seriously affect the seaworthiness of the ship as loaded and the general safety of the conduct of the voyage.

Q. Mr. Dougherty, I show you a paper and ask you what that is.

[fol. 48] A. That is one of our contracts with one of the principal steamship agencies in the Port of New York.

Q. For the performance of stevedoring services?

A. For the performance of stevedoring services.

Mr. Hellawell: I offer that in evidence.

(Discussion off the record.)

By Mr. Hellawell:

Q. I note that this paper is dated 1934. Did this contract or the agreement thereunder carry on during the taxable period, during the years 1936 to 1940 inclusive, and it is still in full force and effect?

A. Yes.

By Mr. Slove:

Q. Is this contract with someone that your company did business with during this taxable period?

A. Tha was our principal customer.

Q. And you received receipts from stevedoring during this taxable period as a result—pursuant to this contract?

A. That's right.

Q. Such receipts as are involved in this hearing?

A. True.

Mr. Slove: I have no objection.

Mr. Wittenberg: (To stenographer) Please mark this Taxpayer's Exhibit Number 6.

(Received and marked Taxpayer's Exhibit #6 in evidence.)

By Mr. Hellawell:

Q. Is that a fairly representative specimen of a contract usually employed by you in connection with stevedoring operation?

A. Yes.

[fol. 49] Q. With the steamship companies?

A. Yes.

Q. Mr. Dougherty, you've spoken of the loading and discharge of vessels of cargo either from alongside the steamer on the dock or to alongside the steamer onto the dock. Are the vessels also sometimes loaded from a lighter alongside the vessel?

A. Yes, at times they load it from lighters to the ship or vice versa.

Q. That would be exclusively the way your operations were carried on, that is, either from a dock alongside of the vessel or from the lighter alongside of the vessel?

A. That's right.

Cross-examination.

By Mr. Slove:

Q. Mr. Dougherty, how long were you president of this company?

A. Since some time in January.

Q. Of this year?

A. Of this year.

Q. What capacity did you have with this company prior to that?

A. From 1922 until the first of this year the secretary of the company; previous to that superintendent, timekeeper, and so forth.

Q. Are you familiar with the returns that were filed by this company with the City?

A. Yes.

Q. Excise Tax returns?

A. Yes.

Q. Now, for the years 1934—for the calendar years 1934, 1935, and 1936 the taxpayer reported in its returns three categories of receipts from stevedoring described as gross income from bills rendered for discharging and loading vessels, gross income from lighterage bills, and gross income from coaling bills. Are you familiar with that breakup?

[fol. 50] Mr. Hellawell: I object to that as not being within the issues, Mr. Slove, because that's outside of the years in question.

Mr. Slove: Suppose we let it go in subject to connection. You can move to strike it out later.

Mr. Hellawell: Yes.

By Mr. Slove:

Q. Will you answer the question.

A. Yes, most of our business came from direct loading and discharging of vessels. The lighterage charges were comparatively small and also those for coaling vessels.

Q. You did have those three sources of income, however?

A. That's right.

Q. Did you have those same three sources of income in the years from 1937 to 1940?

A. We did from stevedoring and lightering but whether we had coal in all of those years I couldn't say with certainty.

Q. You certainly had lightering?

A. We certainly had lightering but the coaling is something that you don't have much of any more.

Q. And did you pay any Excise Tax to the City of New York—when I say "you" I mean the company—by reason of receipts from lighterage bills or coaling bills for the years 1937, 1938, 1939, and 1940?

Mr. Hellawell: Well, I object to it as not being the best evidence. The face of the return shows in the year 1937, I [fol. 51] believe, that there is a coaling and lighterage charge.

(Discussion off the record.)

Mr. Hellawell: I will withdraw that objection.

By Mr. Slove:

Q. Will you answer the question.

A. (No answer.)

(Next to last question read back by stenographer.)

A. No.

Q. Now, Mr. Dougherty, will you please define what you mean by stevedoring.

A. Stevedoring is a contract with a steamship company for the physical work of taking the cargo from a dock and placing it aboard the vessel and properly stowing it in the vessel or taking the cargo from the vessel to a dock and properly stowing it on the dock, or you may take your freight from a lighter in lieu of a dock or put your freight on a lighter and discharge it to a lighter.

Q. A lighter would be defined as a vessel of some kind?

A. Yes, that's a small, usually flat, deck boat with a capacity maybe of two to four hundred tons.

Q. Now, the work that your company did was, for the greatest part, of the first category that you just described?

A. Yes.

Q. So that, to put it simply, when a vessel docked at the City of New York—withdraw that.

[fol. 52] Q. To put it in another way, when a steamship company is anchored at a dock ready to take a cargo it is your business to provide men who will physically take the cargo from a land point and load it onto the vessel or vice versa, taking it off of the vessel anchored at the dock and physically remove it to a land point, is that correct?

A. When you say a land point I think technically a dock is considered to be more or less——

Q. Well, without deciding what a dock is.

A. Well, we might just as well answer the question fully and I say that a dock is a place outside of the customs

limits of the Port of New York and there is where we take it from and put it.

Mr. Slove: I will ask that the last part of the answer be stricken out as not responsive

Mr. Wittenberg: Strike that.

Mr. Hellawell: Well, I submit that it is entirely responsive.

Mr. Slove: I didn't ask him what a dock was.

Mr. Hellawell: But you are saying a land point.

Mr. Slove: Yes. If he doesn't understand the question——

Mr. Hellawell: A specific land point, if you are more specific and say a dock alongside of a vessel.

(Discussion off the record.)

(Last two questions and answers read back by stenographer.)

[fol. 53] By Mr. Slove:

Q. When a steamship company has a vessel moored at a pier ready to take a cargo aboard it is then your company's business to provide men to physically transfer cargo from a land point near the pier onto that vessel and vice versa?

Mr. Hellawell: I object to the characterization of the business in so far as providing men is concerned. It isn't a question of providing men; it is conducting the operation through their employees.

Mr. Slove: I submit that it is a question—whether they provide men or not it is a matter of fact; it is a question that he can answer yes or no.

Mr. Hellawell: One thing is providing men and one thing is conducting an operation. It is quite a different thing. It is a misleading question. Providing men is quite different from conducting an operation through employees.

Mr. Slove: I'll let Mr. Wittenberg rule on it.

Mr. Wittenberg: I believe you should state that the operation is carried through by employees of the taxpayer.

Mr. Hellawell: By the taxpayer through its employees which is the proper thing.

(Discussion off the record.)

By Mr. Slove:

Q. What I am getting at Mr. Dougherty is it is the work of your company through its employees to provide the [fol. 54] man power to do this physical work of transferring the cargo onto the vessel, is that right?

(Discussion off the record.)

A. Well, I will say that the cargo is transferred to the vessel by means of a fall which is suspended over the cargo on the dock and then taken in slings aboard the vessel where it is stowed by our employees.

Q. Now, that work is done by men employed by your company, is that right?

A. True.

Q. Now, before your men, your employees, get to the point where this work is to be done where is the cargo physically located?

A. As nearly as possible to the side of the vessel where it can be easily slung and taken aboard.

Q. Would that be on the sidewalk somewhere along the water front?

A. No.

Q. Might it be there?

A. No, it would be on the dock.

Q. It would always be on the dock?

A. Always on the dock.

Q. A dock being what?

A. A dock is a shed over the water and always below the high water mark of the Port of New York.

Q. Would you say a dock is a floating pier?

A. No, it's secured by piling in the water; supported by piling in the water.

Q. It's something that's physically attached to the land nearest to the water where the vessel is moored, isn't that so?

A. Yes.

Q. Now, the cargo is on the pier or, rather, on the dock, then, when your men—your employees—get there to do this work?

A. That's right.

[fol. 55] Q. Your men have nothing to do with getting it to that point, do they?

A. No.

Q. Now, the men that do this work, are they regular employees of yours?

A. No, they're transients; they're classified much the same as seamen would be on the vessel.

Q. Well, they are employees of your company.

A. On an hourly basis; they may be hired or fired at our pleasure.

Q. They are employees in the sense that they are people that are on your pay roll.

A. Oh, yes.

Q. They are hired by you.

A. True, much the same as a ship hires its seamen.

Q. Yes. You may hire a man and he may be with your company for many years.

A. No, because these men are transients and they work for all contractors.

Q. You wouldn't refuse to hire a man because he wanted to work for you for a long time, would you?

A. We hire him when he is available.

Q. And if he is available you might use the same man for an extended period of time?

A. Well, it is unlikely because these men go from one contractor to another.

Q. If you have plenty of work for men then you have the men around all the time, haven't you?

A. Not the same men.

Q. Well, now, let's get down to cases. During this taxable period can you tell us who some of the men were that did work such as you have described for you?

A. That would be an impossible job because they——

Q. Would your records show it?

A. The records would show it and I think the records of [fol. 56] the New York Shipping Association which controls it—they keep all the records of the earnings of the men and so forth—would show that the average—would show that the average longshoreman doesn't work for the same stevedore half of the week, he continually drifts.

Q. Let's confine ourselves to the question that I am asking. I wanted to know specifically whether you could tell me who some of the men were that did the type of work that you have described in this taxable period.

A. Well, I can only say that they're regular members of the International Longshoremen's Association.

Q. Do you know any of them?

A. Surely.

Q. Can you name some of them?

A. Surely.

Q. Name some of the men that did work for you of the type that you have described in the taxable period for any extended period of time.

A. I'd have to go into my records to get the specific men.

Q. You can't do that without referring to the records?

A. No.

Q. You don't know any of them that well?

A. We may within a year, in fact, we have on our books the names of over six thousand men, which shows how transient they are.

Q. You keep pay roll records, don't you?

A. Sure.

Q. File unemployment insurance returns and social security returns with the New York State and Federal government?

A. Surely.

Q. And that's done quarterly, isn't it?

A. Yes.

Q. And when you file those quarterly returns you show the various men that worked for you in this type of work [fol. 57] during that particular quarter?

A. Yes.

Q. Now, do you know at this time whether names of some of these men appeared for more than one quarter?

A. Oh, yes, undoubtedly they would.

Q. Do you know whether the names of some of these men appeared for more than four quarters?

A. Probably yes.

Q. And were there some men that appeared for several years?

A. Well, I wouldn't know that. It's too transient to go into that phase.

Q. You wouldn't know that without referring to your records?

A. No.

Q. Now where is the office of Carter & Weekes Stevedoring Company?

A. 2 Broadway.

Q. That's the Produce Exchange Building?

A. That's right.

Q. That's the only office that the company has, isn't it?
A. That's right.
Q. Everything clears through that office?
A. Surely.
Q. All the business is carried on at that office?
A. Yes.
Q. Do your men report at that office at any time?
A. Only to receive their pay occasionally; usually they're paid at the docks.
Q. You have somebody that goes to the dock and pays them there often?
A. That's right.
Q. Now, did you say that most of the income from stevedoring such as you have described during the taxable period came as a result of your agreement with Norton, Lilly & Company as evidenced by this contract, Taxpayer's Exhibit 6 in evidence.

[fol. 58] Mr. Hellawell: I object to that question because that was not the question or answer. This is a specimen; it was stated this was a specimen contract with a large customer of Carter & Weekes.

By Mr. Slove:

Q. All right. I will change the question to ask you if a substantial part of your income from stevedoring such as you have described during this taxable period came as a result of this agreement, Taxpayer's Exhibit 6 in evidence?
A. Yes.
Q. Now, where is the office of Norton, Lilly & Company?
A. 26 Beaver Street.
Q. Do you know where this contract was signed?
A. Probably at 26 Beaver Street.
Q. Did your company have a bank account in New York?
A. Yes.
Q. What bank?
A. Chase National.
Q. Where is it located?
A. 25 Broadway.
Q. Is that the only place where you have a bank account?
A. That's all.
Q. What sort of a place do you have at 2 Broadway?
A. We just have our general offices there; we have three, four rooms.

Q. How many people are regularly employed at that office?

A. About twelve.

Q. Do you have your office there?

A. Yes.

Q. Did you always have your office there?

A. Always did.

Q. Are all of the other officers of the company located at that address?

A. Yes.

Q. Are all your bills made out at that office?

A. Yes.

[fol. 59] Q. And sent out from that office?

A. Yes.

Q. And all your collections effected from that office?

A. Yes.

Q. In other words, all your bookkeeping is carried on at that office?

A. Right.

Q. Now, when you bill a customer for the services performed by your company—withdraw that question.

Q. Will you produce a copy of a billing—sample billing—by your company for stevedoring services such as you have described during this taxable period?

A. I presume you want it during that period?

Q. Yes, I just said during the taxable period.

A. Yes.

Q. Now, when you have a job to do how are you advised of it?

A. Well, we usually are told by telephone to confer with one of the operating managers of a steamship company.

Q. Let's refer specifically to this customer, Norton, Lilly & Company. Suppose Norton, Lilly & Company had a job for you to do, how would they communicate that information to you?

A. Well, their operating manager would phone our superintendent to call and be given the instructions.

Q. Your superintendent being someone that's employed at your office at 2 Broadway?

A. Well, no, he's employed on the docks.

Q. Has he got an office somewhere?

A. On the dock.

Q. Where?

A. In the case of Norton, Lilly & Company at that time it was Pier 2, Bush Docks.

Q. Is that in Brooklyn?

A. That is in Brooklyn, foot of 49th Street.

[fol. 60] Q. He had an office there?

A. Yes.

Q. What was his name?

A. John R. Russell.

Q. And his full title?

A. At that time, superintendent.

Q. Just superintendent?

A. Now he is vice president of the company.

Q. At that time, do you mean from 1937 to 1940?

A. That's right.

Q. Throughout those years he was superintendent?

A. In charge of that business.

Q. In charge of the stevedoring business?

A. For Norton, Lilly & Company.

Q. He devoted his whole time to this one customer?

A. That's right.

Q. And he had a personal office, did he?

A. Yes, on the dock.

Q. At the point you just designated?

A. Yes.

Q. Did you have any other superintendents doing work similar to Mr. Russell for other customers?

A. Yes, we had Victor Palmer.

Q. He was also a superintendent?

A. Yes.

Q. Where was his office?

A. Pier foot of Milton Street, Greenpoint.

Q. Greenpoint, Brooklyn?

A. That's right.

Q. Now, did you have any other employees similar to Mr. Russell and Mr. Palmer?

A. No.

Q. Did Mr. Palmer handle any particular business?

A. Yes, he handled the A. L. Burbank & Company account.

Q. Is that all?

A. That's all.

Q. He devoted his full time to that customer?

A. That's right.

Q. How many customers did you have, approximately, during these years for whom you did work similar to what you have just described as stevedoring?

A. Well, they were the only large customers; then we had [fol. 61] some miscellaneous jobs, mostly small; couldn't give you that information without going through the bill books.

Q. Now, who handled the work for the smaller customers?

A. I did.

Q. And you handled it from your office at 2 Broadway?

A. That's right.

Q. What percentage of your income from stevedoring, approximately, resulted from Mr. Russell's activities, Mr. Palmer's activities, and your activities?

A. Well, between the three of us would be a hundred per cent.

Q. Break it down?

A. You mean proportionately?

Q. Yes.

A. Mr. Russell about fifty per cent., Mr. Palmer about twenty-five, the smaller accounts combined about twenty-five.

Q. What did the office of Mr. Russell consist of at Pier 2, Bush Docks, Brooklyn?

A. The steamship company assigned him an office there on the dock.

Q. I see. It was the office of the steamship company?

A. It was part of the space for which they paid rental.

Q. Your company didn't have to pay anything at all?

A. No.

Q. Did you have any employees of your company in addition to Mr. Russell there at that location?

A. No regular employees.

Q. Mr. Russell, however, was your employee?

A. That's right.

Q. He was paid a salary by Carter & Weekes.

A. Yes.

Q. Now, with respect to Mr. Palmer at the foot of Milton Street in Greenpoint, Brooklyn, what sort of an office did he [fol. 62] have at that point?

A. He had an office assigned also by the terminal people.

Q. Did your company pay anything to maintain that office?

A. No.

Q. Did you have any employees outside of Mr. Palmer there?

A. No regular employees.

Q. Did you have any part time employees?

A. No, only the longshoremen, of course, when a vessel was working.

Q. Did you have a telephone at either of these two offices?

A. Yes.

Q. Telephone that Carter & Weekes paid for?

A. That's right.

Q. At each office?

A. Yes.

Q. And Mr. Palmer was a regular employee of Carter & Weekes?

A. Yes.

Q. He was paid a regular salary by Carter & Weekes?

A. Yes.

Q. Now, I think I asked you before what was the practice when a customer, we'll take Norton, Lilly & Company for example, had a job for you to do, how did they communicate that. Will you repeat that again?

A. They would call either our office or the superintendent direct.

Q. They might call your office at 2 Broadway?

A. They might.

Q. Or they might call Mr. Russell direct at the pier?

A. At the pier and they would ask him to confer with their operating manager and arrange for the loading of the ship when the freight was delivered on the dock.

Q. In other words, they would tell either you or someone at your office at 2 Broadway, or Mr. Russell that they had a boat that was to be loaded.

A. That's right.

[fol. 62] Q. And they needed some of your employees to do the loading, is that right?

A. Yes.

Q. Now, what would you say was the—withdraw that.

Q. As between calling upon your company, your office at 2 Broadway directly and calling upon Mr. Russell to tell him about such a job, what would you say was the percentage?

A. Well, they would always call Mr. Russell first.

Q. Yes?

A. Unless the operating manager should be making a social call at the office, then he might tell us to have Mr. Russell call on him.

Q. Ordinarily they'd call Mr. Russell first?

A. Call Mr. Russell directly.

Q. When they called Mr. Russell he'd then call you?

A. Oh, no, he would report directly to them.

Q. What was the next step?

A. Then they would notify what foreign ports the vessel was going to, the order of those ports, and they'd——

Q. Just a moment, the case that we are going to take would be a case of a boat that had come in and had to be unloaded. Take such a case. Now, what would Mr. Russell do after the customer told him that the boat was moored at the pier ready to be unloaded?

A. Well, then they would supply him with a stowage plan of the vessel showing how the cargo was stowed in the ship, what foreign ports it came from, and whether it was to go to lighters or to the dock. Then he would go ahead with the job.

Q. This was done in every case?

A. Oh, yes, it must be done.

Q. They would always provide what you call a stowage plan?

A. True.

[fol. 64] Q. Do you keep those plans in your files?

A. I think we have some of them.

Q. Will you submit a typical one that was used in this taxable period for this customer?

A. Surely.

Q. Then Mr. Russell from that point how would he go about getting the men to do the job?

A. Well, usually the men what we call shape around the pier, you see.

Q. They what?

A. They shape at the pier; they call it shaping. They report at the head of the pier in order to be employed and then we take them in through the gate of the pier as they are employed, man for man, and the foreman picks them out.

Q. What foreman?

A. The foreman of the job would be directly under Mr. Russell.

Q. You mean a foreman employed by your company?

A. That's right.

Q. Well, do you have a foreman stationed at the pier at all times?

A. No, we employ him when required.

Q. The first thing you would do is to get a foreman, is that it?

A. True.

Q. Who does that?

A. Mr. Russell; whoever the superintendent is supplies the foreman.

Q. The superintendent ordinarily would employ a foreman?

A. That is right.

Q. Is that foreman any more steady an employee than the stevedores generally?

A. No.

Mr. Hellawell: Longshoremen generally.

Mr. Slove: Longshoremen generally.

A. (Continuing.) The only difference is we pay him a daily wage instead of an hourly wage.

[fol. 65] By Mr. Slove:

Q. Then you get a foreman and he in turn picks out the other men?

A. That's right.

Q. With final approval by the superintendent?

A. No, that's his job; if he doesn't do it right we'd get another foreman.

Q. It is up to the foreman to get as many men as he thinks are necessary?

A. No, the superintendent would specify the number of men but he would employ the type of men that he thinks are capable.

Q. You mean the foreman would.

A. The foreman would.

Q. And where do they report for work?

A. At the entrance to the pier.

Q. Pursuant to directions from the foreman?

A. That's right.

Q. And who supervises or keeps record of their time?

A. The timekeeper.

Q. Employed by you?
A. By us, yes.
Q. Now, how does the timekeeper get to the pier?
A. How does he get there?
Q. Is he always stationed there?
A. No, he is paid on a daily basis the same as the foreman.
Q. You get a timekeeper for the job just as you get a foreman for the job, is that the idea?
A. Yes.
Q. Timekeeper submits his reports to whom?
A. To the superintendent.
Q. And the superintendent passes it on to your office?
A. That's right.
Q. And the pay roll is prepared in your office?
A. No, on the dock.
Q. It is prepared on the dock?
A. Yes.
[fol. 66] Q. By the superintendent?
A. By the timekeeper.
Q. Well how is the pay roll actually prepared in the sense of where does the money come from to pay the men?
A. The money must come from our office.
Q. Is a check drawn at your office?
A. That's right.
Q. For the entire pay roll?
A. That's right.
Q. On a daily basis?
A. On a weekly basis.
Q. And how do you know how much of a check to draw?
A. Well, we prepare the pay roll about two or three days before pay day, which gives us ample time to check it.
Q. Who prepares it?
A. The timekeeper prepares it, then it is checked in our office.
Q. The pay roll is prepared and sent to your office at 2 Broadway where it is checked?
A. And then paid within a couple of days.
Q. And a draft is drawn in your office?
A. Yes.
Q. Cash is provided?
A. Yes.
Q. And sent over to the superintendent?
A. To the pier.

Q. How does it get there?

A. By armored truck.

Q. Individual envelopes are made out for the men?

A. That's right.

Q. All that is done in your office?

A. Yes. When I say in the office we usually do it in the bank, in the vaults of the bank.

Q. How do you determine the amount to charge your customer for the particular services that are rendered by the company?

A. Well, we charge him on the tonnage basis.

[fol. 67] Q. You have a schedule of charges incorporated in the contract with the customer?

A. That's right.

Q. And you make up your charges pursuant to that schedule?

A. True.

Q. Now, where are those bills or invoices prepared?

A. In our office,

Q. At 2 Broadway?

A. Yes.

Q. You will produce a sample billing at the next hearing?

A. Yes.

Q. Now, did you ever have occasion to go to any agency as a means of securing necessary men to do stevedoring work for you?

A. No.

Q. Such as an employment agency?

A. No.

Q. Or a union?

A. No.

Q. You always have men available at the docks whom you can pick up to do the work?

A. Yes.

Q. That's been the situation throughout these years involved?

A. True.

Mr. Slove: Well, I think that we can suspend at this point.

Mr. Wittenberg: Hearing adjourned to July 8, 1943 at 2 o'clock.

[fol. 68] Office of the Comptroller

Bureau of Excise Taxes

July 30, 1943 Room 515 2 P. M.

In the Matter of CARTER & WEEKES STEVEDORING Co., A-11-13 Produce Exchange, New York, N. Y. (M-133438.) Business Tax Deficiency

Minutes of Hearing of July 30, 1943

Before Solomon Wittenberg, Presiding Officer

For the Comptroller: Jacob Slove, Esq., Assistant Corporation Counsel.

For the Taxpayer: Attorney; Edwin V. Hellawell, Esq., 70 Pine Street, New York, N. Y.

Witness: Charles E. Dougherty (Recalled) Andover, N. Y.

Mr. Wittenberg: This is a continuation of a formal hearing last held on June 4, 1943 in connection with a determination by the Comptroller of the City of New York against the Carter & Weekes Stevedoring Company, [fol. 69] A-11-13 Produce Exchange, New York City, assessing a Business Tax covering the period January 1, 1937 to December 31, 1940, in the total sum of $1,828.97, of which $1,594.54 is principal and $234.43 is the interest penalty.

CHARLES E. DOUGHERTY was recalled as a witness for the taxpayer.

Mr. Hellawell: Pursuant to the request of the Corporation Counsel at the last hearing I am going to produce what is known as an outward stowage plan of the Steamship *City of Winchester*, February, 1939, which is a representative stowage plan. I offer that exhibit.

By Mr. Slove:

Q. Is that a plan that was submitted to you in connection with any work that you did during this taxable period, Mr. Dougherty?

A. Yes, we made this plan up.

Q. Yourself?

A. For the steamship company.

Q. At their request?

A. That is part of our duties as a service corporation.

Q. You get paid for it?

A. No—in connection with the operation.

Q. In order to be able to do the work you make up this plan?

A. Yes.

Q. You have somebody go aboard the steamer?

A. Continuously during the operation.

Q. Well, it's done in the beginning, isn't it, before you start the operation?

A. Well, it starts with the operation, continues through-
[fol. 70] out until its completion.

Q. What continues—the making of the plan?

A. The making of the plan while the ship is being loaded. The two are done simultaneously.

Q. How long does it take to make a plan like this?

A. A week or ten days.

Q. What is the purpose of making a plan?

A. So that when the ship is discharged at the other end the unloading stevedoring company will know how the cargo has been stowed and can intelligently discharge them.

Q. In other words, this is then a report of the work that is done by your employees?

A. Practically, yes.

Q. Now, you say this was in connection with work done for any particular customer of yours?

A. The Norton, Lilly & Company.

Mr. Slove: No objection.

Mr. Wittenberg: Mark this Taxpayer's Exhibit Number 7 in evidence.

(Received and marked Taxpayer's Exhibit 7 in evidence.)

Mr. Hellawell: Now, pursuant to the request of the City I produce an inward stowage plan; that is, on a vessel from a foreign port, coming in, arriving at New York, it being an inward stowage plan. *S. S. Kaikoura*, sailed November 8, 1939.

By Mr. Slove:

Q. Is this plan similarly made in connection with work that you did for one of your customers?

A. That would be a plan made by the stevedore in Aus-

[fol. 71] tralia for our use in discharging the vessel at New York.

Q. And that was submitted to you by your customer?

A. That's right.

Q. The same company?

A. The same company, Norton, Lilly & Company.

Q. By reference to this plan your employees are facilitated in doing their work of unloading the steamer, is that it?

A. That's right.

Mr. Slove: All right; no objection.

Mr. Wittenberg: Mark this Taxpayer's Exhibit Number 8.

(Received and marked Taxpayer's Exhibit Number 8.)

Mr. Hellawell: Pursuant to request of the City I produce a sample billing representing a billing on an outward cargo on the steamship *Piako*, dated December 9, 1939.

By Mr. Slove:

Q. This is a copy of an actual invoice that was rendered by Carter & Weekes to Messrs. Norton, Lilly & Company during this taxable period?

A. Yes.

Q. And this amount of $5,548.03, is that included in the receipts that were the basis of the assessment here in issue?

A. That's right.

Mr. Slove: No objection.

Mr. Wittenberg: Mark this Taxpayer's Exhibit 9.

(Received and marked Taxpayer's Exhibit 9 in evidence.)

[fol. 72] Mr. Hellawell: That's all.

Mr. Slove: Now, at this time I wish to refer to that portion of the testimony given by Mr. Dougherty at the last hearing which specifically—pages 15 and 16 thereof—characterizes the stevedoring services of the taxpayer as constituting foreign commerce, and I move that such characterization be stricken out as being improper in form and unresponsive to the question originally asked, and improper as calling for a legal conclusion. The same would apply to any reference to any portion of its business being interstate or intrastate commerce, those being questions of law to be determined in this hearing, among other things.

Mr. Hellawell: I object to the striking out of that testimony on the ground that by the testimony of Mr. Dougherty showing that he had thirty-six years of experience in the stevedoring business, that ninety-five per cent of that business constitutes foreign commerce, and that that is a conclusion of fact which he as an expert may draw as a result of his years of experience in the business. His testimony shows that ninety-five per cent of the vessels which were loaded or discharged by the company during the years in question here were destined to foreign countries or arriving from foreign countries, and that that is a fact, conclusion or opinion that he may freely draw as an expert.

[fol. 73] Mr. Slove: I have no objection to his saying that ninety-five per cent of the cargo was destined for foreign ports, but my objection is directed to his conclusion that that is foreign commerce, or at least this part of that transaction, the stevedoring which he has defined as loading of boats, constitutes foreign commerce. That is clearly, in my opinion, a question of law, and I therefore move to have it stricken out.

Mr. Hellawell: I maintain that the testimony as given should stand. The Court can, in a later review, if that is necessary, strike out that or disregard it if they feel it is a conclusion of law. I say it is a conclusion of fact.

(Discussion off the record.)

Mr. Wittenberg: It is ordered that the sentence on page 15: "All of the stevedoring services performed on such vessels constitute foreign commerce," shall be stricken out of the record, and it is ordered that the clause on page 16 which states: "and our work thereon was interstate commerce," shall be stricken off the record.

Mr. Hellawell: Objection and exception, and I ask that the minutes be transcribed—that it shall not be physically stricken from the record and it shall show the objection and the testimony as given.

Mr. Wittenberg: That is correct; the minutes will reflect the statements that are made at this hearing.

[fol. 74] Mr. Hellawell: All right.

I just want to call attention to one sentence, also at page 16, I believe it is, of the transcript—because I haven't got pages that correspond and I don't know what your pages are, but there was just an omission, typographical omission, from the statement, and the statement is: "Ninety-five per cent of the vessels that were loaded and discharged by our

company during the years 1936 to 1940, inclusive, were destined to foreign countries." I ask, because it is a fact, that there be added after the word "to," the words "or arrived from" foreign countries.

Mr. Slove: You want to add that as though Mr. Dougherty has so testified?

Mr. Hellawell: Yes, and I ask for that stipulation.

Mr. Slove: All right; I have no objection to adding those words.

Recross-examination.

By Mr. Slove:

Q. Now, at the last hearing I don't recall now, Mr. Dougherty, whether I asked you or not how many people are employed by your company at your office in 2 Broadway.

A. I'd say approximately twelve or fourteen.

Q. Those are in addition to the superintendents that you mentioned at pier points away from your office?

A. They are additional employees.

Q. Do you have any employees stationed at any point outside of the City of New York?

A. No, we don't.

[fol. 75] Q. Does your company own any property outside of the City of New York?

A. No.

Q. Now, in describing your method of operation at the last hearing, you stated that it was up to the superintendent, your superintendent, to get a foreman and the men to do the necessary work, do you remember that?

A. That's right.

Q. Now, you also said that it was the superintendent, not the foreman, who would determine how many men were necessary, is that correct?

A. Yes.

Q. Well, now, how was that done?

A. They would merely tell the foreman how many men he would employ——

Q. I mean from what source was the superintendent able to determine how many men would be required in any given job?

A. Through his experience in having handled cargoes before.

Q. Well, now, is there any actual calculation necessary to be made to determine that fact?

A. Oh, yes, according to how large the operation is.

Q. Well, you would have to make a plan before you can determine it?

A. Well, you do it according to your experience in having handled previous cargo, either loading or discharging.

Q. Well, taking a specific case—I will ask you first referring to Taxpayer's Exhibit 9—does this refer to one special job that was done?

A. That's right.

Q. Do you remember this particular case?

A. No; we probably handled several hundred vessels since.

Q. Well, would this include everything that was done in connection with this loading operation?

A. Yes.

[fol. 76] Q. This invoice?

A. That's right.

Q. As reflected in Exhibit 9?

A. That's right.

Mr. Hellawell: I move to strike out the question, Mr. Slove, as not being comprehensive enough. It isn't everything that is done; it's the result of everything that was done. Naturally, you don't mean by your question, I assume, that by everything that is done it includes whether men put certain drafts of cargo and put it into the vessel and that they used the winches and——

Mr. Slove: No. I don't mean it from that sense. I am just referring to whether this is the entire job or whether this is for part of the work.

Mr. Hellawell: I see—in that sense.

Mr. Slove: Maybe it took only one day and maybe took six months, and there would be several bills for it, so I wanted to know whether this included the entire loading of this boat.

Mr. Hellawell: Then I have no objection to that.

Q. Now, then, when this order came in from Norton, Lilly & Company, did you or your superintendent know what the total tonnage was to be loaded?

A. As a rule we know approximately but not definitely.

Q. But when the order is given are any figures submitted to you?

A. Yes, but they are subject to change. They may what they call "shut out" some of the cargo and add other cargo in place of it. The shipper isn't able to bring the proper [fol. 77] cargo to the vessel. Those things are always tentative up until the time the vessel is completely loaded.

Q. This order is given to you at the time when the vessel is empty?

A. That's right.

Q. And when it's given to you are you advised as to what the capacity is?

A. Yes.

Q. And when the cargo is furnished the customer knows that the vessel will take it?

A. We keep them informed during the loading as to the additional capacity of the vessel because you can't tell definitely when a ship starts exactly how much it will take. They may ask us to measure the empty space in the vessel from time to time and then they will gauge additional cargo.

Q. At what point is your company called in with relation to the docking of the steamer in New York?

A. Well, they tell us where the vessel is going to dock and how many gangs of men are required to work the vessel, and then we go ahead and start the job.

Q. Are you given these facts after the vessel is actually docked at a pier in New York?

A. No; usually before she docks.

Q. Shortly before?

A. Yes.

Q. In other words, when the customer, Norton, Lilly in this case, expects a vessel to come in from some outside port, they prepare in advance to have it loaded?

A. That's right.

Q. Shortly after it's docked?

A. Yes.

Q. Now, how soon after it is docked does the loading commence?

A. Usually as soon as possible.

Q. Would you say within a few days?

A. Within a few hours.

[fol. 78] Q. Well, isn't it customary to have the ship supplied first, overhauled, repaired, conditioned, and so forth?

A. That depends on the condition of the ship whether it's necessary. Usually not.

Q. Usually a vessel has to be refueled after it docks, doesn't it?

A. They usually do that during the process of loading.

Q. That doesn't interfere with your work?

A. It might stop us for a while but it's part of the necessary service.

Q. Well, isn't it more often that they will get that out of the way first?

A. No, usually during the loading—either during the loading or after the loading; very seldom before.

Q. How about cleaning up of the vessel and emptying out the storage places, when is that done?

A. That is done after the vessel discharges, before the loading is started.

Q. Well, then, it's first necessary to discharge the vessel before it is loaded?

A. Not necessarily, because she may come here without any cargo and start loading; most of these vessels did.

Q. Most of the vessels that you had dealings with came in unloaded—empty?

A. That's right, empty. They go from Australia to England; they unload in England; and they come over here to load for Australia again.

Q. There wasn't anything coming in during this period of time?

A. No.

Q. Although you did do some business of unloading?

A. Some, but not very much.

Q. Now, then, getting back to the specific instance, as near as we can, covered by this invoice (indicating), you [fol. 79] would be told by Norton, Lilly in some way approximately how much tonnage was expected to be placed on that ship?

[fol. 79] A. That's right.

Q. Now, was that communicated to you in any written form?

A. Usually they give us what they call a cargo list, which is a tentative statement of what is going aboard the vessel.

Q. In tonnage?

A. Yes.

Q. And materials?

A. That's right.

Q. So that in this case where it speaks of autos, heavy lifts, bar iron, pine, steel plates, old newspapers, case oil, structural steel, bag cargo ore,—those are the various materials that you would understand were to be loaded on this steamer?

A. Those are the materials that actually were loaded on the vessel. The tentative list that we would get wouldn't agree with that.

Q. Not in quantities?

A. During the process of loading there would be changes.

Q. When would you get this tentative list that you speak of?

A. Maybe three or four days before the vessel docked.

Q. And what was the purpose of that?

A. So that we could intelligently plan the loading before we started; put the proper materials in the proper places.

Q. Could you do that without the stowage plan?

A. Well, that is a final plan after the vessel is loaded. Before the vessel is loaded we make up the tentative plan of how we expect to load the vessel.

(Discussion off the record.)

Q. When you make this plan based on the tentative list, you don't yet have a stowage plan?

[fol. 80] A. That's right; the stowage plan is made up as the vessel goes. The other is the tentative plan of how we expected to load it, which is never completed according to the tentative plan because adjustments must be made.

Q. It looks something similar to the final plan that is drawn up?

A. Yes, but not as complete as that.

Q. Now, can you tell from this plan or from the tentative plan that you make up approximately how many men will be required to do the job?

A. Pretty well.

Q. Is that one of the reasons that you make the plan so you can be prepared to know how many employees you will require to do the job?

A. No, that is secondary, because we can tell that from day to day according to what cargo we load. The idea of the tentative plan is that the vessel be properly loaded, and should be stowed properly. There are certain things that can't be loaded with other things; have to be in different

hatches. The weight must be properly distributed in the vessel.

Q. In other words, from the tentative plan you can tell that there is a certain number of pounds of various types of equipment, and with that knowledge you can tentatively plan just approximate where the various materials in the various weights will be placed?

A. That's right.

Q. And you do make such a plan?

A. Yes.

Q. Now, where is that plan made, and by whom?

A. That is usually made by the superintendent.

Q. At his office?

A. At his office or at his pier as a rule.

[fol. 81] Q. Now that may all be done before the steamship reaches New York, might it night?

A. Well, usually, yes.

Q. It usually is done before?

A. Yes.

Q. And after the steamer gets there some time passes before the material is actually brought to the dock for the purpose of loading?

A. Not necessarily. Very often your vessel starts loading immediately upon docking.

Q. Is the material already there?

A. The material is there; it usually is.

Q. Is that because the customer arranges to have it there at or about the time the steamer docks?

A. That's right.

Q. Now, how are you advised to actually commence the loading operation?

A. We usually are ordered by the operating manager of the steamship company.

Q. He calls up the superintendent?

A. He calls the superintendent.

Q. And tells him that the stuff is there and the boat is there?

A. That's right.

Q. Is that the form that it takes, a telephone conversation, or is any writing——

A. No, it's always telephone.

Q. In other words, the plans for that already would have been received prior to that and this is simply the signal that the time has come to begin work?

A. That's right; it's confirmation of a former arrangement.

Q. Now what, generally, would you say is the time element between those two things—the time that you get the first notice that there will be some work and the time that you are notified that you are to go ahead with the work?

A. A couple of hours.

[fol. 82] Q. Does it ever take a day or more than a day?

A. No. We might be told at four o'clock this afternoon to start a vessel tomorrow morning. That is about the limit of that time we are given.

Q. And then this preliminary plan would only be made within those few hours?

A. No, the preliminary plan might be made two or three days before.

Q. Then your answer isn't correct when you say two or three hours? I asked you how much time at the outside would elapse when you are first notified that you are going to have a job and the time when you are given the signal to go ahead with your men.

A. We would be notified about the job probably two or three days before, but the actual time of starting would be arranged within a matter of a couple of hours.

Q. Yes, I understand that. So there would be two or three days that you have in which to make your preliminary plan?

A. That's right.

Q. Then on the day that you are to start what happens when the superintendent gets that notification that the boat is ready to be loaded?

A. Then he starts the job.

Q. How does he go about getting the men?

A. The men come to the dock and they are hired on the dock, and they go to work.

Q. I will ask you this preliminary question: Does the workday begin at any particular hour?

A. It may begin, according to the rules of the union, that the men must shape, as they say, at eight o'clock or one p.m. or seven p.m. at night.

Q. Would you say that generally throughout this period that eight a.m. would be the usual starting time?

A. Usually; more often than not it is.

[fol. 83] Q. So that generally the superintendent would know that eight o'clock he was to start this loading operation?

A. That's right.

Q. And did your office have any preliminary arrangements prior to that?

A. No.

Q. There was nothing to do?

A. No, the men merely come to the dock and——

Q. I mean before the actual work, was any written record made?

A. No, it's all done by telephone between the operating manager and our superintendent on the dock.

Q. How about the order itself; is that recorded?

A. No, nothing in writing. Everything is oral between the operating manager of the steamship company and the superintendent.

Q. Well, you have this preliminary list; that was in writing?

A. Yes.

Q. You say that is the only thing in writing between the two parties up to that point?

A. That's right.

Q. That and the basic underlying contract, of course?

A. Yes.

Q. Now, then, at eight o'clock, then, of the day that the work is to begin the superintendent goes out and there are men around the piers from which he can get his crew, so to speak?

A. That's right; they come right on the dock and are hired there.

Q. They are hired right then and there before the workday begins?

A. Yes.

Q. Now, in a case such as this, would the superintendent hire or know how many men to hire to do the entire job?

A. No, that is done from hour to hour, according to the conditions as they may arise.

[fol. 84] Q. He wouldn't know whether this was going to take a day or two or three, would he?

A. Only approximately.

Q. What basis did he use in knowing how many men to hire? Is there a maximum number of men that can work at one time?

A. No maximum, but there is a minimum. We can't hire less than twenty men at a time. That is a union regulation. We may require more.

Q. Well, as a matter of business expediency is it the practice to have men work in gangs of twenty?

A. Yes.

Q. And if it is a big job there will be just so many more gangs, is that the idea?

A. So many more gangs and so many more men in the gang, according to what we are handling, according to the type of the vessel. It may be a different type of vessel that requires more men in the holds.

Q. All that is determined as the work is going on?

A. That's right.

Q. The superintendent can tell whether he needs five gangs or ten gangs, or whatever the number may be?

A. That's right, according to how the cargo arrives.

Q. That is, by that you mean how the cargo arrives from some point in New York to the dock?

A. Well, not necessarily in New York——

Q. Well, from some point away from the dock to the dock?

A. Some outside point; most of it comes from Jersey.

Q. Now, all that material is in sealed cartons or containers as it reaches the dock, isn't it?

A. No, it may be in any condition; it may be steel that has no container. It may be a truck that has no boxing on it.

Q. It is all labeled for shipment, though?

A. Not necessarily.

[fol. 85] Q. It may not be?

A. They may send the papers along with it to identify it. Usually it's not labeled.

Q. Do your employees have anything to do with shipping documents?

A. No.

Q. That is handled by the steamship company?

A. Yes.

Q. Or their agents?

A. That's right.

Q. Such as the Norton, Lilly & Company?

A. That's right.

Q. You people don't even see them?

A. No, we have nothing to do with them; ours is only a physical operation.

Q. Does Norton, Lilly & Company have any representative on the dock while this operation is going on?

A. Yes; they have their own superintendent, clerks, checkers, watchmen.

Q. Do they check your men?

A. Yes.

Q. They check your time, the time of your men?

A. Yes; either they or the ship's officer—one or the other.

Q. Do they have their own time clerks or do they check the work of your time clerks?

A. Well, as a rule the checking is done by the ship's officers as to our operation.

Q. The time is checked?

A. Yes. In other words, we have slips signed by the chief officer which certifies as to our service.

Q. When are those slips signed?

A. They may be signed daily; maybe not until the ship has completed loading.

Q. Are they signed for a number of hours or number of men?

A. Both number of men and number of hours.

Q. Does that indicate the number of men—withdraw that.

[fol. 86] Q. Are any of those slips available in your company's files?

A. I think we have some, yes.

Q. Could you locate slips for this particular invoice, Taxpayer's Exhibit 9 in evidence?

A. I think so.

(Discussion off the record.)

Q. Will you produce the slips for this job?

Mr. Hellawell: I object to that. I can't see the materiality of it, Mr. Slove.

Mr. Slove: I think that to the extent that it will establish the nature and extent of the operations of this company in New York City it's material.

Mr. Hellawell: It isn't a question of how many hours were spent in a particular operation. It's the amount of work done and the nature of the work that was performed in New York City that is material and the only material

thing here. Whether we spent in this service five hours or a hundred hours on any particular ship is absoutely irrelevant to the inquiry here. The thing is only cluttering up the record and doesn't mean anything. What does it mean?

Mr. Slove: I think it's quite vital to the issue as to the local nature of this work.

(Discussion off the record.)

Q. Can you tell from your records actually how much time was spent by your employees in the entire loading operation for this job, reflected in Taxpayer's Exhibit 9? [fol. 87] A. No. As I said before, it would be amalgamated with the other jobs going on at the same time.

Q. You can't tell from your records how much time any job took?

A. No; they are all in one pool, the whole business.

Q. You mean the time is all pooled together?

A. That's right.

Q. You do know, however, from your own experience that some jobs take longer to load than others?

A. Yes.

Q. That would depend on the size of the steamer and the size of the cargo, and so forth?

A. And the kind of the cargo.

Q. And in this taxable period you did have some jobs that took a whole day?

A. Yes.

Q. What would you say was the outside length of time that any particular job took?

A. Maybe a week.

Q. Which would mean that you have stevedores employed for a week?

A. That's right.

Mr. Hellawell: Longshoremen.

Mr. Slove: I think we used the term interchangeably, don't we?

Mr. Hellawell: The real term is longshoreman. Longshoreman is a more accurate term.

Mr. Slove: Does stevedoring take in more than the work of the longshoremen?

Mr. Hellawell: Stevedoring is the operation.

Witness: Stevedore is the loading head of the ship—the superintendent.

Mr. Slove: Stevedoring is supplying the longshoremen to do certain things?

[fol. 88] Mr. Hellawell: No, not that accurately. Stevedore is a man who is responsible for the loading of the ship whereas the longshoremen are the men who actually do the physical work.

Mr. Slove: I see.

Q. So that when I asked you earlier today whether the superintendent could tell in advance how many longshoremen would be required to load the entire cargo I think your answer was that he wouldn't know in advance.

A. No.

Q. But he would continue to engage the men sufficiently as required until the job was completed?

A. That's right. He has to be governed by the conditions of the arrival of the cargo and so forth.

—. It might be advisable to have on the record your explanation as to what records are kept or are available from which you determine how to calculate your charges to your customer, such as is reflected in Taxpayer's Exhibit 9. Can you explain that briefly?

A. I can't more than I have already told you; we bill according to the amount that they give us. In other words, this is what they give us and we bill them back.

(Discussion off the record.)

A. (Continuing.) I think the simplest way to put it would be to say that we accept from the company a summary of the ship's manifest and we bill them back according to those figures.

Q. The ship's manifest being a list of all the bills of lading containing all of the shipments or cargo that goes on that ship?

A. That's right.

[fol. 89] Q. And that summary or manifest is the basis from which the company gives you the total weight, and you in turn accept that weight as a basis for making your invoice such as Taxpayer's Exhibit 9?

A. That's right.

Mr. Slove: I think we will suspend at this point.

(Discussion off the record.)

(Hearing adjourned to September 15, 1943 at 10 A. M.)

[fol. 90] Office of the Comptroller

Bureau of Excise Taxes

September 15, 1943 Room 510 10 A. M.

In the Matter of Carter & Weekes Stevedoring Co., A-11-13 Produce Exchange, New York, N. Y. (M-133438.) Business Tax Deficiency

Minutes of Hearing of September 15, 1943

Before Solomon Wittenberg, Presiding Officer

For the Comptroller: Jacob Slove, Esq., Assistant Corporation Counsel.

For the Taxpayer: Attorney; Edwin V. Hellawell, Esq., 70 Pine Street, New York, N. Y.

Witness: Charles E. Dougherty (Recalled). Andover, N. Y.

Mr. Wittenberg: This is a continuation of a formal hearing last held on July 30, 1943, in connection with a determination by the Comptroller of the City of New York against the Carter & Weekes Stevedoring Company, A-11-13 [fol. 91] Produce Exchange, New York City, assessing a Business Tax covering the period January 1st, 1937 to December 31st, 1940, in the total sum of $1,828.97 of which $1,594.54 is principal and $234.43 is the interest and/or penalties.

Charles E. Dougherty, recalled as a witness on behalf of the taxpayer, was examined and testified as follows:

Recross-examination.

By Mr. Slove:

Q. Mr. Dougherty, at the last hearing we were speaking of slips that you had your customer or somebody on the ship sign to evidence the work that was done by your employees. You haven't any of those slips here, have you?

Mr. Hellawell: Well, as I understood it after the last hearing that request was waived because the slips had no materiality and I was not under the impression that the production would be requested.

Mr. Slove: Well, as I indicated, the purpose of the slips was to indicate the location of the work and to indicate to what extent it was confined to New York City. I understand you are prepared to concede that——

Mr. Hellawell: We will concede that all the work except a very small portion of it during these years in question was actually performed on vessels moored to piers in the City of New York.

Mr. Slove: All right.

[fol. 92] By Mr. Slove:

Q. Now, can you just tell us whether these slips indicated the address of the pier where the work was actually done, where the loading was done?

A. Usually not.

Q. Did they indicate the name of the vessel that was being loaded?

A. Well, they might have either one or the other, but not both.

Q. I see. You could, however, identify a particular slip with a particular operation that you had worked in this taxable period, could you not?

A. At the time the operations were so extensive that I wouldn't be able to recall any specific operation now after a period of years.

Q. If you looked at the slip and all the information on the slip wouldn't that——

A. Wouldn't mean anything to me now.

Q. Did any other independent records that you have show the amount of time that was—the cost of the time that was actually spent in unloading an operation?

A. No, we don't keep that after the operation is finished. We just——

Q. You have no permanent cost records?

A. No, we haven't.

Q. Now, when the merchandise was—withdraw that.

Q. Before you commenced your activity, your company commenced any activity, I believe you previously testified that the merchandise was already or previously prepared and placed on the dock, is that right?

A. That's right.

Q. Now, you weren't notified where the merchandise was [fol. 93] destined for, were you, I mean specifically as to individual consignees?

A. Oh, yes, we'd have to know what port the merchandise was destined to go.

Q. Well, you mean just the port, the name of the city.

A. That's all, yes.

Q. But you weren't interested, you didn't actually know the name of the individual consignee, did you?

A. No.

Q. You weren't concerned with the ultimate destination.

A. No, we were only interested in the immediate port of destination.

Q. Nor were you concerned with how the merchandise would ultimately be delivered to the final consignee after it reached the port.

A. No.

Q. You don't know how that was effected.

A. No.

Q. Now, what is the mechanical operation of loading, what type of equipment is used? I think you covered it generally, but——

A. I think I did. We put in what we call a draft, we place the cargo in a draft.

Q. Is that a piece of equipment?

A. That's a piece of equipment; maybe a net, a rope net; maybe a rope sling; it may be a wire sling.

Q. Something that's attached to a pulley.

A. Yes, that's right.

Q. Yes?

A. A winch and a hook, the winches are aboard on the vessel attached to a wire fall and then a hook on the end of that wire fall, and the hook picks it up through the mechanics of the winch—steam winch, usually, or electric winch—raises it over the ship and down into the hold.

(Discussion off the record.)

[fol. 94] Q. Whose property is that draft that you speak of?

A. Well, that would be the property of the ship or of the consignee, I wouldn't know which.

Q. Is it part of the ship's equipment?

A. No, the draft is the cargo. It is the freight itself.

Q. Oh, the draft is the cargo itself.

A. That's right.

Q. Well, I understood you to describe it as a piece of equipment.

A. No.

Q. It is used in loading?

A. It is the shipment; the equipment confines the draft.

Mr. Hellawell: It is a collection of cargo which is made up into a draft. Any collection of cargo that could be handled by a sling is a draft.

By Mr. Slove:

Q. Well, how about the sling? Who owns the sling?

A. We would own the sling, or maybe perhaps the ship: sometimes we have——

Q. Do you own the sling in some cases?

A. Sometimes we have an arrangement where the ship supplies the sling and other times we would supply it.

Q. Well, do you have a quantity of slings?

A. Oh, yes.

Q. You have a place where those things are kept?

A. We keep them on the dock.

Q. Do you have a tool room or some kind of room where you keep various equipment?

A. Yes, we keep them on the docks. Every dock that we [fol. 95] operate on we have what we call a gear room and in that we keep the equipment necessary for loading the ship.

Q. What other equipment would you keep in that room?

A. That's all, just what we——

Q. Do you have anything with wheels, do you have any pulleys?

A. Yes, we have some pulleys.

Q. Dollies?

A. Might have, depending on the operation.

Q. Well, apart from any operation, you have a certain amount of equipment that the company owns at all times.

A. Oh, yes.

Mr. Wittenberg: Mr. Hellawell, have you any other questions?

Mr. Hellawell: I have no other questions.

I want to address myself to the Conferee who has been presiding at these hearings and ask for a dismissal of the proceedings and cancellation of the tax on the ground that

this specific question, the only one involved here, has been specifically ruled on by the Supreme Court of the United States in the case of the Puget Sound Stevedoring Company which has previously been cited.

The nature of the services performed by Carter & Weekes Stevedoring Company during the years in question, 1937 to 1940 inclusive, were, as the testimony shows without contradiction, ninety-five per cent foreign commerce and five per cent interstate commerce, as to which the Supreme Court has said there shall be no tax because it is not a local [fol. 96] operation and not subject to a local business tax. The services were a necessary and integral part of foreign or interstate commerce, are, in fact, interstate and foreign commerce and so not subject to tax, and I ask for cancellation of the tax and dismissal of the proceedings.

Mr. Wittenberg: Have you anything further to say, Mr. Slove?

Mr. Slove: No.

Mr. Wittenberg: We'll mark the case closed; decision reserved.

[fol. 97] PETITIONER'S EXHIBIT 1 IN EVIDENCE

(Comptroller's Notice of Deficiency Tax Assessment with Schedules)

(Printed herein at pages 27-29 as part of the transcript of proceedings.)

PETITIONER'S EXHIBIT 2 IN EVIDENCE

(Tax Return for Year 1937)

(Printed herein at page 25 as part of the transcript of proceedings.)

PETITIONER'S EXHIBITS 3, 4 AND 5 IN EVIDENCE

(Tax Returns for the Years 1938, 1939 and 1940)

(Printing omitted pursuant to stipulation at page 109.)

[fol. 98] PETITIONER'S EXHIBIT 6 IN EVIDENCE

Stevedoring Contract

American and Australian Line—Loading

Memorandum and Agreement between Norton, Lilly & Company, New York, as agents for the American and Australian Line, of London, of the first part and Carter & Weekes Stevedoring Co., Stevedores of New York, of the second part.

1. The party of the first part agrees to give the above mentioned stevedores of the second part stevedoring work on all vessels owned, controlled or chartered by the party of the first part loading at the Port of New York, provided that the stevedoring is not otherwise fixed by charter party; and the above named stevedores hereby undertake to perform the stevedoring work on the following terms and conditions.

2. The stevedores shall take delivery of goods, whether by land or water, at the point where the shipper is bound to deliver them, according to the custom of the Port of New York, and/or the Produce Exchange Rules, transport the cargo to, and load it on board the oncarrying steamer with all due dispatch, and safety and properly stow same according to the destination, laying dunnage and platforms in the holds; all to the satisfaction of the Board of Underwriters of New York, and/or other surveyors, and/or the party of the first part, and/or the owners, and/or the charterers or other accredited representative, and the stevedores shall also supply extra labor, as required, in accordance with Paragraph #9.

[fol. 99] 3. The stevedores shall supply all the necessary tackle and appliances, but shall have the use of cargo appliances as on Board, including rope and steam as customary.

4. The stevedores shall be paid for loading outward cargo, as before mentioned, at the following inclusive rates:

	At Yard	At Dock
Case Oil (Kerosene, Benzine, Nap-tha, Turpenti[illegible], Gasoline and other like products) per Case high top or low top; other size packages at proportionate		

	At Yard	At Dock
rates, *Stevedores paying hoisting charges when steamer loads at oil yards*	$.03¼	$.03¾
General Cargo, per ton of 40 Cubic feet or 2240 lbs. for pieces up to 5 tons weight		1.15½
Pieces over 5 tons weight, but not exceeding 10 tons weight, per ton, weight or measurement		1.32
Pieces over 10 tons weight, per ton, weight or measurement		1.48½
Locomotive and Car Material, per ton, weight or measurement		1.37½
Structural and Bridge Material, per ton, weight or meas.		1.54
Grain, Flour Meal or Samp (in bags), per 2240 lbs.		1.07¾
Tobacco, per hogshead		1.32
Rosin, per 2240 lbs.		1.59½
[fol. 100] Railroad Iron, up to and including 45 feet, per ton		1.15½
Railroad Iron, over 45 feet, and up to 60 feet, per ton		1.21
Bar Iron and pipes of all sizes, per ton		1.15½
Steel Plates, per ton		1.43
Pig Iron, per ton		.99
Newsprint Paper per ton (Weight)		1.43
Waste Paper in bales, weight of 2240 lbs.		1.43
Grain—Stowing bags—per 1000 bushels		16.50

Tonnages as per steamers manifest, which figures are to be mutually accepted, with the understanding that bridge and structural iron, locomotive and car material and heavy pieces to be figured actual weight and measurement; domestics; paper and cigarettes to be figured measurement; all other cargo to be figured as now carried.

5. These prices to cover the stowage of cargo in any part of the vessel in which it is determined to carry cargo for the voyage, including building up wings when midships are required to be kept open, also to cover any trucking within ship's length plus 100 feet each end. Any stacking or extra trucking to be charged for as extra labor.

6. Coaling. If required by owners, coal to be put on board and stowed in permanent, and/or reserve bunkers, and/or bridge deck, and/or deck space, and/or holds, including trimming.

For quantities up to and including 200 tons in any one ship, at cost plus 10% and Liability insurance.

For quantities over 200 tons, at $1.10 per ton.

[fol. 101] 7. Shifting bunker coal, if required, at cost plus 10% and liability insurance.

8. Heavy Lifts. Stevedores to use ship's gear for loading pieces of any weight when ordered to do so by ship's representative. Ship to pay all costs of floating derrick whenever used. Stevedore to be paid special rates for stowing pieces over 5 tons weight, locomotive and car material, structural and bridge material, as per schedule of rates under clause #4.

9. Extra Charges. If required by the Captain and/or other accredited representative, the stevedores are to supply men for cleaning up the holds, mooring and unmooring steamers, and similar work at the following rates:

		Gen'l Cargo	C/s Oil at Piers Per Hour	C/s Oil at Yard
Weekdays 8 AM to 12 noon—1-5 PM. Men		$1.07	1.36	1.65
Except Saturday afternoons	Foreman	1.38	1.56	2.05
All overtime, including Saturday afternoons and all Meal Hours	Men.	1.52	1.94	
	Foremen.	1.82	2.19	

10. Overtime. The Stevedores are to be paid at the following rates:

Men and Foremen—Overtime including Saturdays afternoons, and all Meal Hours	.45	.58	Men
		.63	Foremen.

11. Winch Time. The Stevedores are to supply winchmen at the following rates:

[fol. 102]

Week Days	1.07	1.36	1.65
Overtime, including Saturday afternoons and all Meal Hours	1.52	1.94	

Bulk, Cargo, ballast and coal 5¢ per hour additional.

EXPLOSIVES.

The Stevedores are to be paid at the following rates:

Weekdays 8 AM to Noon & 1 to 5 PM.	Men.	2.14 per hour
except Saturday afternoons	Foremen.	2.76 " "
All Overtime, including Saturday	Men.	3.04 " "
afternoons, and all Meal Hours	Foremen.	3.3[illegible] " "

When men are specifically ordered out from New York and/or Brooklyn to work on the North and East River

above 75th Street, or on Piers at Weehawken, Communipaw, West New York, Long Island City, and/or Staten Island, carfare in excess of that spent in traveling to their usual place of employment shall be allowed. Men specifically ordered out from New York, and/or Brooklyn to work at Yonkers, Bayonne, Claremont, Carteret, Chrome, Edgewater and/or Port Newark shall receive the equivalent of 2 hours pay at the prevailing day rate, plus cost of transportation.

Legal Holidays are: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the Jersey Shore, Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas and such other National or State Holidays as may be proclaimed by Executive authority.

12. Steamer is to supply all necessary dunnage.

[fol. 103] 13. The Stevedores shall be responsible for any damage due to the negligence of the Stevedore, or his workmen, that may be done to the ship and/or cargo in connection with the operations to be carried or in pursuance of this agreement, and shall indemnify and save harmless the party of the first part, and/or the owners, and/or the charterers on account of such damage, and on account of injuries causing disability or death to workmen employed by the stevedore resulting from the negligence of the stevedore or his workmen, while the said stevedore is engaged in the transportation, discharging and loading or stowing of cargo.

14. The stevedores agree to take every precaution to see that their men do not smoke in holds and also agree that any men found smoking will be dismissed.

15. The Stevedores are to effect, and to keep alive during the continuance of this agreement, a full policy of insurance against employer's and public liability, to cover their employees and the public.

16. The Stevedores shall not sublet any of the work in this contract, except by written consent first obtained from the party of the first part.

17. The Stevedores agrees to give the Steamers the best possible attention and dispatch, and guarantee to provide

sufficient men to carry out the work, but they are not to be held responsible for strikes, or delays for accidents beyond their control.

[fol. 104] 18. This agreement shall take effect from October 1st 1934 and shall continue thereafter subject to three months notice in writing from either side of their desire to cancel same.

19. If at any time during the currency of this agreement, either party should have cause for dissatisfaction with the work done, they are at liberty to cancel same forthwith.

20. It is understood, that in case any disputes arise, the same are to be settled by arbitration, the Lines choosing one man, the Stevedores one man, and if these do not agree, these two to choose a third.

21. The above rates are based on wages paid longshoremen at this time. Should there be any change, same to be adjusted according to the increase or decrease of longshoremen's wages.

Dated at New York this 5th day of December 1934.

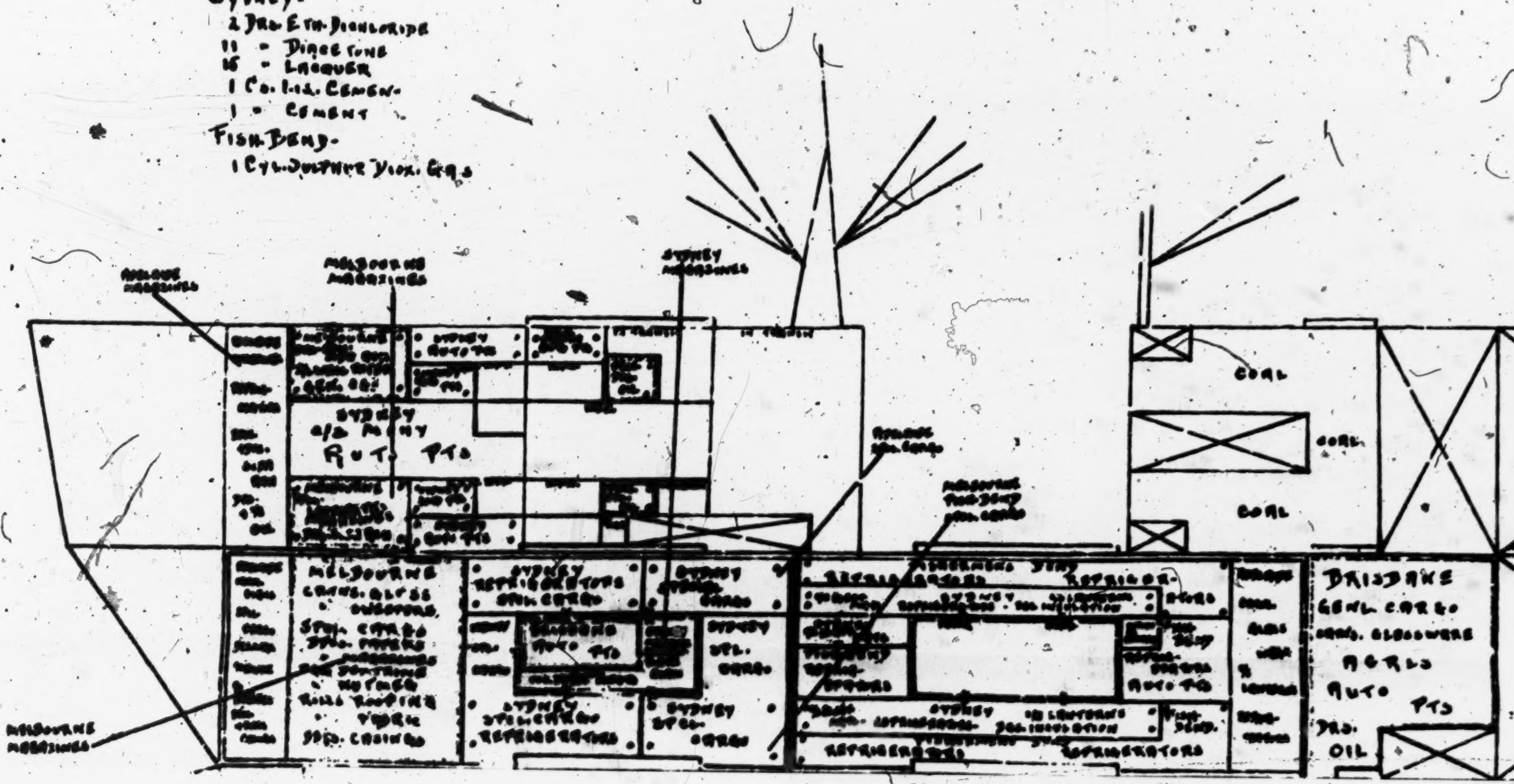
Norton, Lilly & Company, as Agents. Carter & Weekes Stevedoring Co., H. C. Jarvis, President.

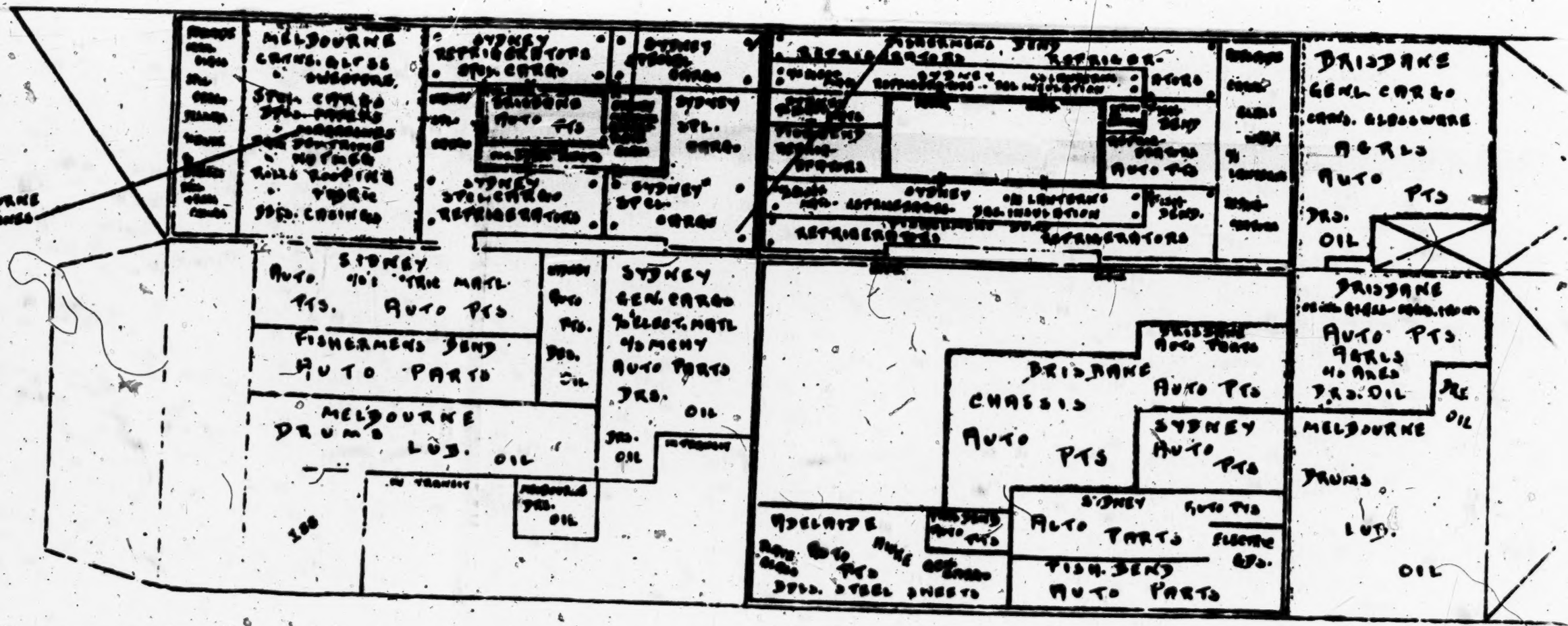
(Back) Norton, Lilly & Co. American Australian Line Contract. Effective 1st Oct. 1934.

(Here follow two photolithographs, side folios 105-106)

TAXPAYER'S EXHIBIT No. 7 IN EVIDENCE
7/30/43 N.D.

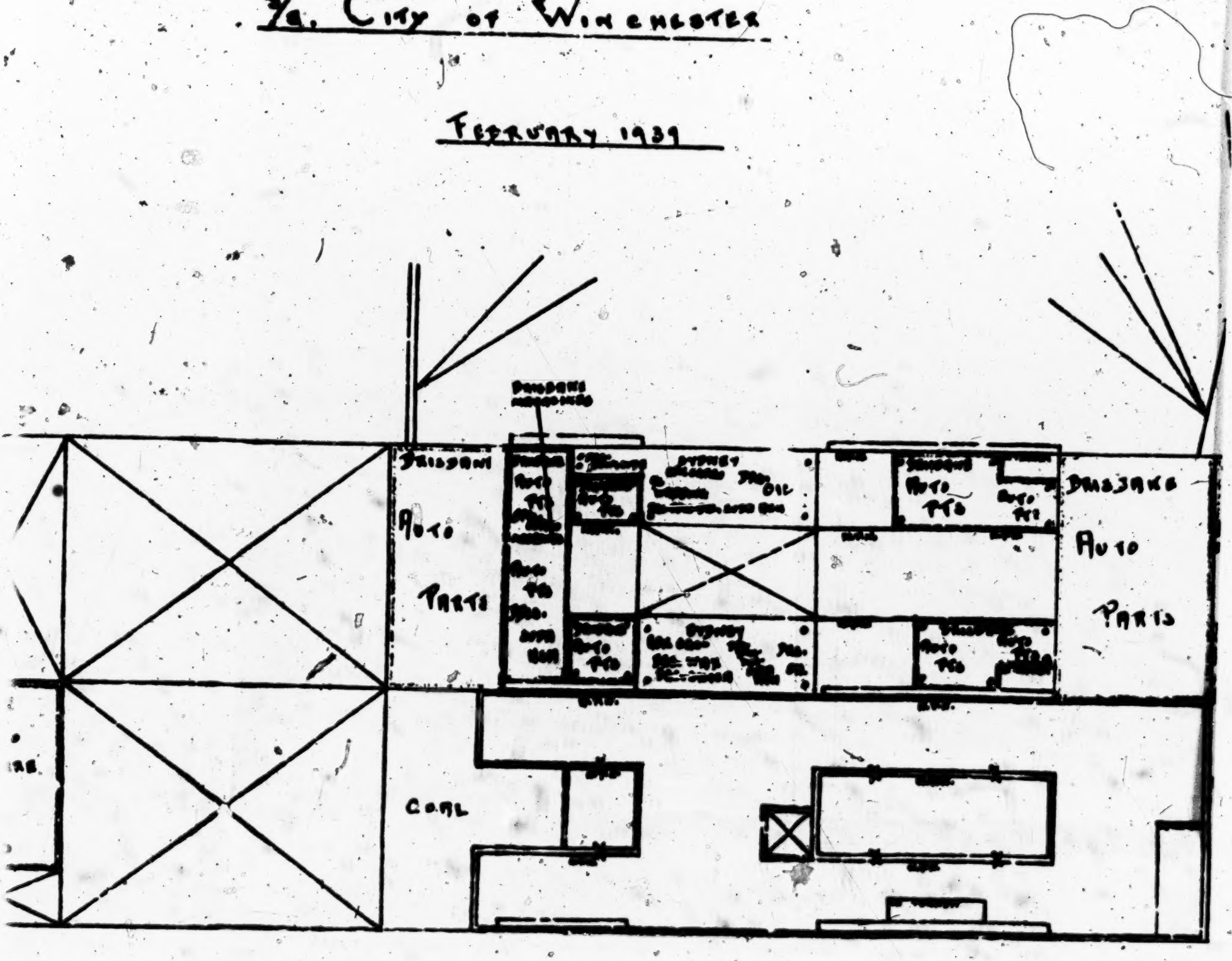
On Deck-
Sydney-
2 Jrs. Eth. Dichloride
11 - Diacetone
16 - Lacquer
1 Co. Ltd. Cement
1 - Cement
Fish Bend-
1 Cyl. Sulphur Dioxide Gas

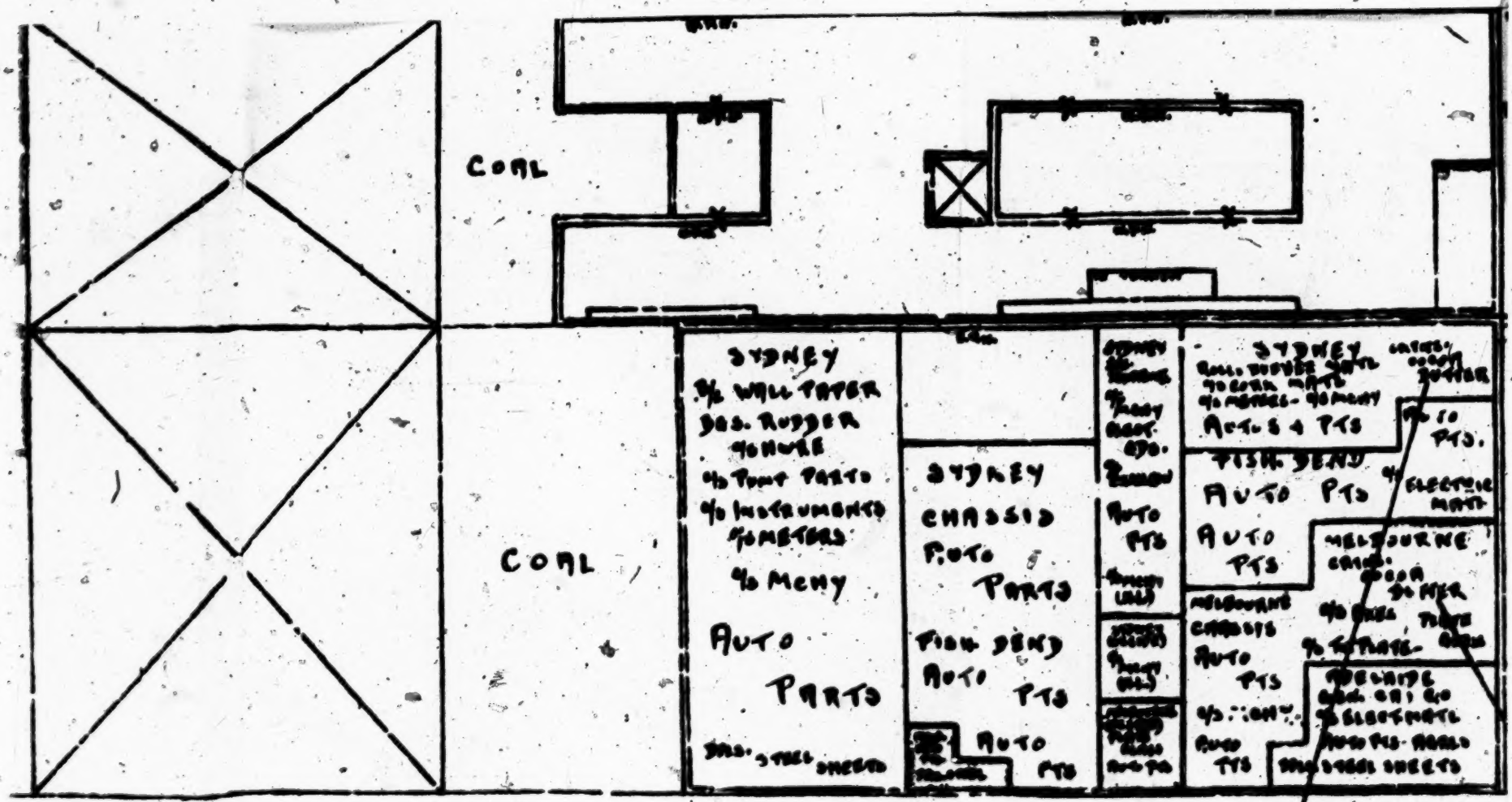



MELDOURNE
SYDNEY
SYDNEY
SYDNEY

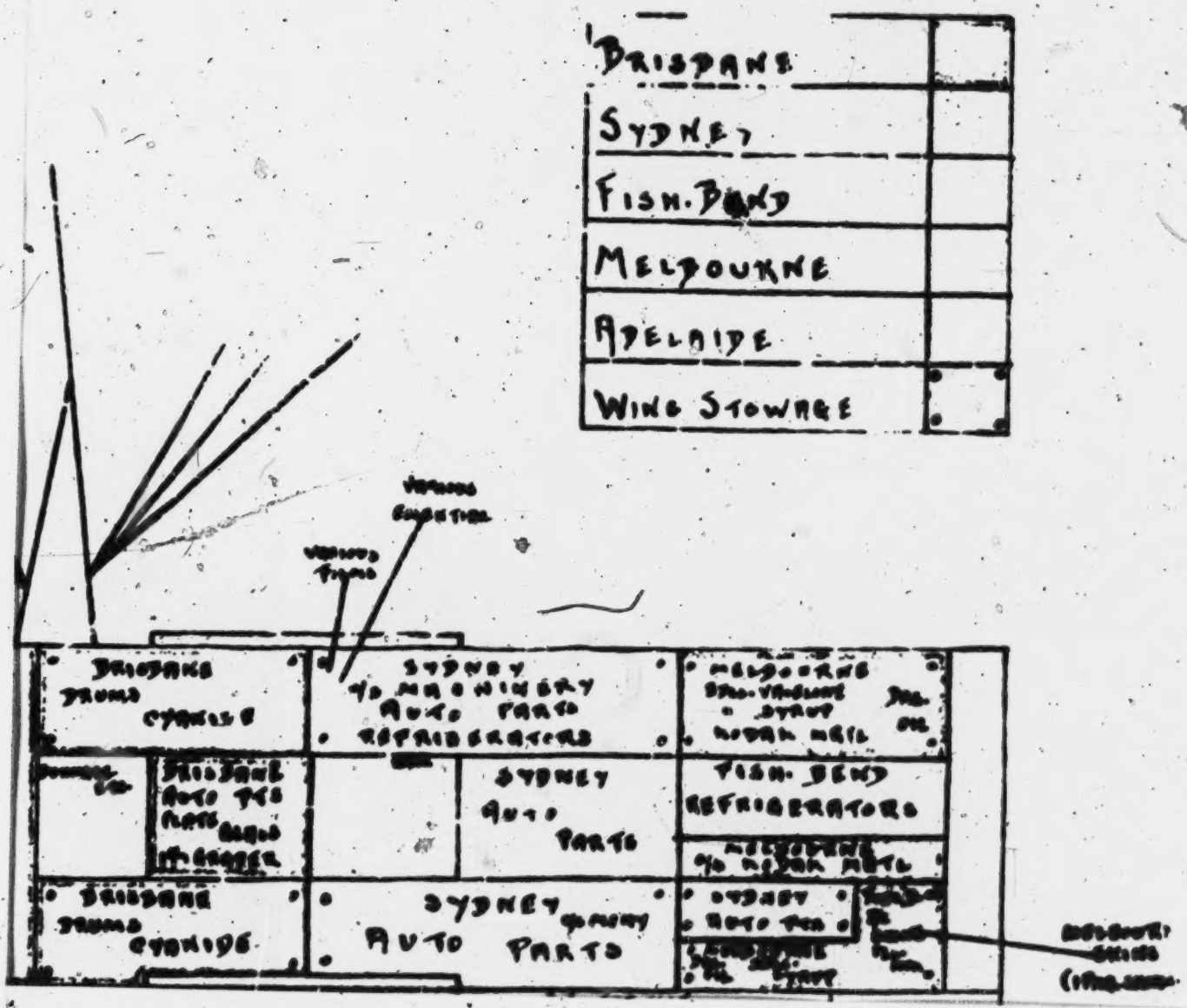
Va. City of Winchester

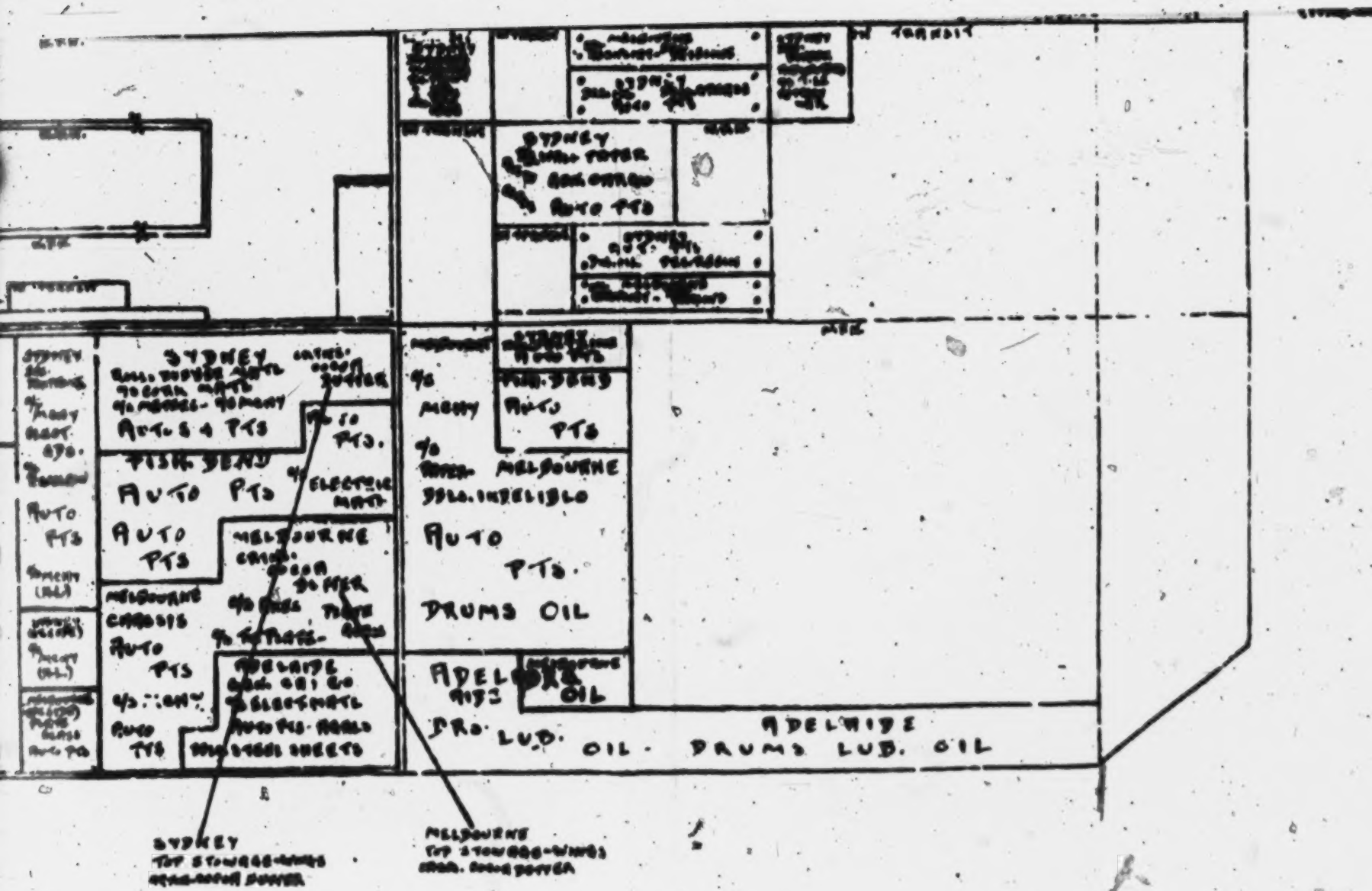
February 1939




COAL
COAL
SYDNEY
% WILL TAPER
DAS. RUBBER
% HOSE
% PUMP PARTS
% INSTRUMENTS
% METERS
% MCNY
AUTO
PARTS
SYDNEY
CHASSIS
AUTO
PARTS
FISH. DEPT
AUTO PTS
AUTO
PTS
SYDNEY
AUTO & 4 PTS
FISH. DEPT
AUTO PTS
% ELECTRIC
MOTS
AUTO
PTS
MELBOURNE
MELBOURNE
CHASSIS
AUTO
PTS
SYDNEY
MELBOURNE

PETITIONER'S EXHIBIT 7.
IN EVIDENCE.




SYDNEY
AUTO PTS
MELBOURNE
AUTO
PTS.
DRUMS OIL
ADELAIDE
PRO. LUB. OIL · DRUMS LUB. OIL
SYDNEY
MELBOURNE

TAXPAYER'S EXHIBIT No. 8 IN EVIDENCE

9/30/43 H-2.

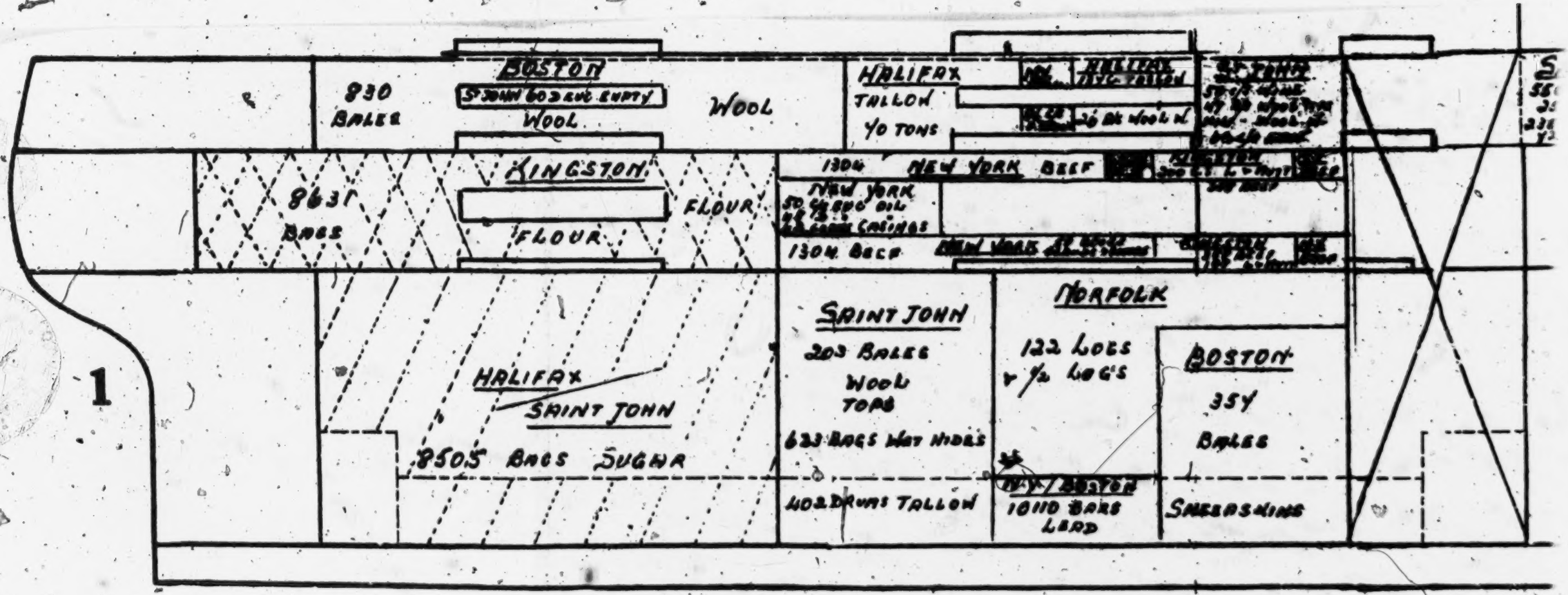
Colour	PORT	Freight Tons	D. W. Tons
	CRISTOBAL		
	KINGSTON		
	NORFOLK		
	NEW YORK		
	BOSTON		
	HALIFAX		
	SAINT JOHN		
			6425

49533 Cu ft Remaining Space
2600 Tons Lifting Available

STOWAGE PLAN S.S.

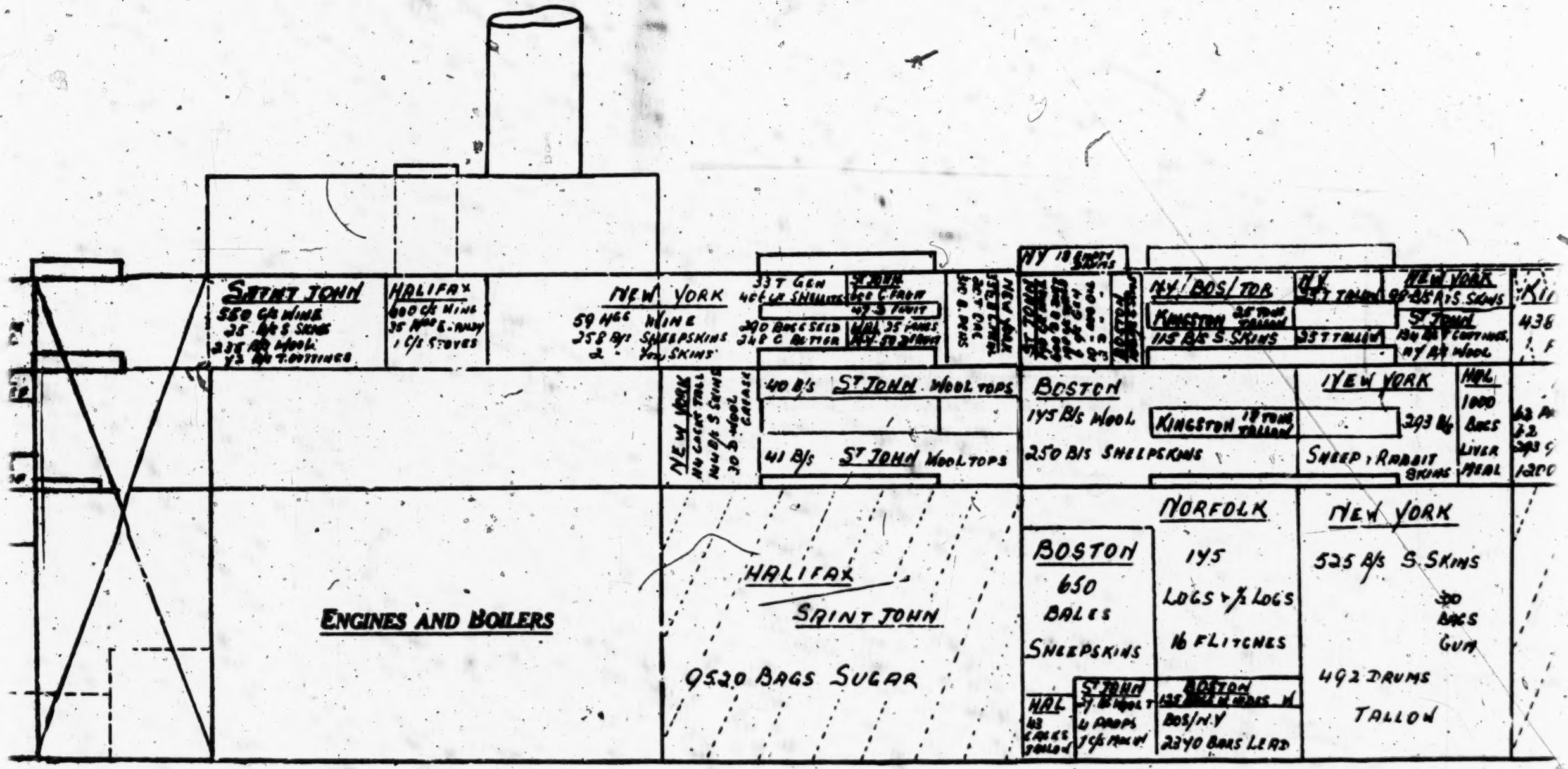
1 SHOW "IN ELEVATION" STOWAGE OF CARGO IN LOWER HOLDS, TWEEN & SHELTER DECKS

2 3 SHOW "PLAN" OF STOWAGE IN SHELTER & TWEEN DECKS


930 BALES
BOSTON
ST JOHN 60 DEAD EMPTY
WOOL
WOOL
HALIFAX
TALLOW
40 TONS
8631 BAGS
KINGSTON
FLOUR
FLOUR
1304 NEW YORK BEEF
NEW YORK
1304 BEEF
HALIFAX
SAINT JOHN
9505 BAGS SUGAR
SAINT JOHN
203 BALES
WOOL
TOPS
623 BAGS WET HIDES
402 DRUMS TALLOW
NORFOLK
122 LOGS
& ½ LOG'S
N.Y. / BOSTON
10110 BARS
LEAD
BOSTON
354
BALES
SHEEPSKINS
1

MONTREAL AUSTRALIA NEW ZEALAND LINE LIMITED

S.S. "KAIKOURA" Voy. 6 From ADELAIDE MELBOURNE SYDNEY BRISBANE To


SAINT JOHN
550 Cs WINE
25 Bls S SKINS
235 BG WOOL
½ Bls T. COTTINGS
HALIFAX
600 Cs WINE
35 MDSE & RUM
1 C/s STOVES
NEW YORK
59 MDSE WINE
258 B/s SHEEPSKINS
2 " " SKINS
33 T GEN
466 LB SHELLAC
47 S TWIST
390 BAGS SEED
348 C BUTTER
NEW YORK
40 B/s ST JOHN WOOL TOPS
41 B/s ST JOHN WOOL TOPS
NY / BOS / TDR
KINGSTON 35 TONS TALLOW
115 B/S S. SKINS
33 T TALLOW
NEW YORK
99 B/S S. SKINS
ST JOHN
436 B/S T. COTTINGS
NY B/S WOOL
BOSTON
195 B/S WOOL
KINGSTON 15 TONS TALLOW
250 B/S SHEEPSKINS
NEW YORK
293 B/S
SHEEP & RABBIT SKINS
MDSE
1000 BAGS LIVER MEAL
ENGINES AND BOILERS
HALIFAX
SAINT JOHN
9520 BAGS SUGAR
BOSTON
650 BALES SHEEPSKINS
NORFOLK
195 LOGS & ½ LOGS
16 FLITCHES
NEW YORK
525 B/S S. SKINS
300 BAGS GUM
492 DRUMS TALLOW

721

106

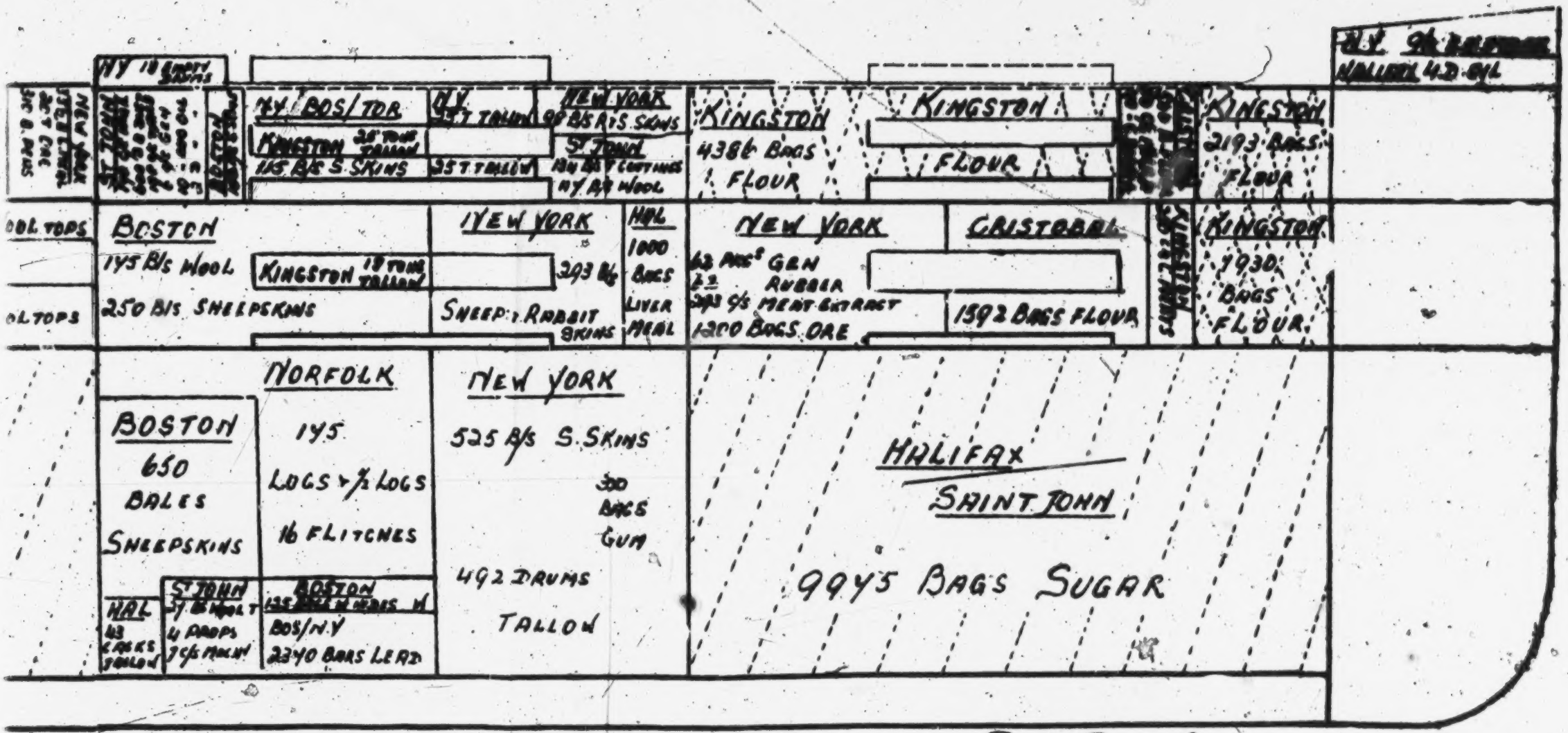
PETITIONER'S EXHIBIT 8.
IN EVIDENCE.

To ~~CRISTOBAL~~ ~~KINGSTON~~ ~~NORFOLK~~ ~~NEW YORK~~ ~~BOSTON~~ ~~HALIFAX~~ ~~SAINT JOHN~~

Sailed 8th Nov 1939

DRAUGHT ON SAILING For'd 21' 00" Aft. 22' 10"

	Tons	STATE HOW DISTRIBUTED
BUNKER COAL		
FUEL OIL	616	
WATER BALLAST		



C. O. Parkinson 26

[fol. 107]

PETITIONER'S EXHIBIT 9 IN EVIDENCE

BOwling Green 9-2878 Invoice Copy Rooms A. 11-15

To CARTER & WEEKES STEVEDORING CO., Dr.
Produce Exchange Annex
2 Broadway
New York, N. Y.

Steamer Pinko, and Owners
Messrs. Norton, Lilly & Co.

Invoice No. #8175
Date Dec. 9th, 1939

To Loading General Cargo				
Meas.	2275 tons			
Weight	1127 "			
	3402 "			
Autos & K. D. Autos				
Meas.	447 "			
Weight	84 "			
	3933 "	@	1.16 per ton	4562.28
Heavy Lifts 5-10 Tons				
To Loading Meas.	43 tons	@	1.40 per ton	60.20
Bar Iron				
To Loading Weight	6 tons	@	1.25 per ton	7.50
Pine				
To Loading Meas.	64 tons			
Weight	439 "			
	503 "	@	1.50 per ton	754.50
Steel Plates				
To Loading Weight	15 "	@	1.50 per ton	22.50
Old Newspapers				
To Loading Weight	1 ton	@	1.30 per ton	1.30
Case Oil at Pier 2 Bush Docks				
To Loading Meas.	215 cases	@	.04 per case	8.60
Structural Steel				
To Loading Meas.	37 tons			
Weight	13 "			
	50 "	@	1.68 per ton	84.00
Bag Cargo Ore				
To Loading Weight	41 tons	@	1.15 per ton	47.15
				$5548.03

[fol. 108] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss:

Edwin V. Hellawell, being by me duly sworn, deposes and says:

That he is the attorney for the petitioner herein and is familiar with all the proceedings had herein and that no Opinion was rendered by the court below in this proceeding.

Edwin V. Hellawell.

Sworn to before me this 6th day of October, 1944.
Ruth A. Sherwood, Notary Public. (Seal.)

[fol. 109] In Supreme Court of New York, Appellate Division, First Department

In the Matter of the Application of Carter & Weekes Stevedoring Company, Petitioner,

For an Order

against

Joseph D. McGoldrick, Comptroller of the City of New York, et al., Respondents

Stipulation Waiving Printing of Exhibits

It Is Hereby Stipulated and Agreed, subject to the approval of this Court, that petitioner's undertaking for the payment of costs in the above proceeding, and Exhibits 3, 4 and 5, Tax Returns for the years 1938, 1939 and 1940, respectively, be omitted from the printed record herein, and

It Is Further Stipulated that the said Exhibits may be referred to in briefs or on argument or handed up to the Court on argument by either party hereto with the same force and effect as if printed in full herein.

Dated, New York, January 5, 1945.

Edwin V. Hellawell, Attorney for Petitioner. Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents.

SJW, ICD.

So Ordered. F. M.

[fol. 110] Stipulation Waiving Certification

It Is Hereby Stipulated that the papers as hereinbefore printed consist of true and correct copies of the order transferring this proceeding to the Appellate Division, First Judicial Department, the notice of application under Article 78 of the Civil Practice Act, petition, answer and return, and all other papers now on file in the office of the Clerk of the County of New York upon which the court below acted in transferring this proceeding to the Appellate Division for determination.

Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, January —, 1945.

Edwin V. Hellawell, Attorney for Petitioner. Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents.

[fol. 111] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

In the Matter of The Application of CARTER & WEEKES STEVEDORING COMPANY, Petitioner,

For an Order Against JOSEPH D. MCCOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Respondents

NOTICE OF APPEAL TO THE COURT OF APPEALS

SIRS:

Please Take Notice that the respondents hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March 1945 and entered in the office of the Clerk of said Appellate Division on or about the 10th day of April 1945 annulling the determination of the respondent Joseph D. McGoldrick Comptroller of the City of New York upon the law with $50 costs and disbursements and directing the respondents to refund the amount deposited by the petitioner herein and the respondents appeal from each and [fol. 112] every part of said Appellate Division order as well as from the whole thereof.

Dated: May 1st, 1945.

Yours, etc., Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents, Office & P. O. Address: Municipal Building, Borough of Manhattan, New York City.

To: Edwin V. Hellawell, Esq., Attorney for Petitioner, 70 Pine Street, Borough of Manhattan, New York, N. Y.
Archibald R. Watson, Esq., Clerk of New York County.

[fol. 113] IN SUPREME COURT OF NEW YORK; APPELLATE DIVISION—FIRST DEPARTMENT

Present: Hon. Francis Martin, Presiding Justice; Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon Edward S. Dore, Justices.

In the Matter of The Application of CARTER & WEEKES STEVEDORING COMPANY, Petitioner,

For an Order Against JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Respondents

ORDER—March 16, 1945

The above-named petitioner having moved at Special Term, Part I, of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Act, for an order [fol. 114] transferring the record of this proceeding to this Court for a review of the final determination of respondent, Joseph D. McGoldrick, that there was due and payable to the City of New York from petitioner a business tax deficiency in the amount of $2,352.75 for the years 1937, 1938, 1939 and 1940, pursuant to Local Law No. 22 of 1937, Local Law No. 20 of 1938, Local Law No. 103 of 1939 and Local Law No. 78 of 1940, said amount including tax and penalty interest and which said amount of $2,352.75 was deposited by petitioner with the City of New York; and the said motion having been granted by order dated May 3rd, 1944, transferring all proceedings and papers herein to this Court for review and determination; and the application to review said determination having been argued in this Court by Edwin V. Hellawell, Esq., of counsel for the petitioner, and by Samuel J. Warms, Esq., of counsel for the respondents; and due deliberation having been had thereon, it is unanimously

Ordered, that the said determination of respondent, Joseph D. McGoldrick, be and the same hereby is in all respects annulled, upon the law, with $50.00 costs and disbursements to the petitioner; and it is further unanimously

Ordered that the respondents, or either of them, upon due service of a certified copy of this order, forthwith refund to petitioner the amount so deposited, viz.: $2,352.75 deposited on February 24th, 1944.

[fol. 115] IN SUPREME COURT OF NEW YORK, APPELLANT DIVISION—FIRST DEPARTMENT

MEMORANDUM OPINION

(Reported in 113 New York Law Journal 1025, March 17th, 1945)

15160. Matter of Carter & Weekes Stevedoring Co., pet. (McGoldrick, res.)—Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90). Settle order on notice.

[fol. 116] WAIVER OF CERTIFICATION

It is Hereby Stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division and all papers upon which said order of the Appellate Division is founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated New York, May 9th, 1945.

Ignatius M. Wilkinson, Corporation Counsel, Attorneys for Respondents-Appellants. Edwin V. Hellawell, Attorney for Petitioners-Respondent.

[fol. 117] IN COURT OF APPEALS OF NEW YORK

Present, Hon. Irving Lehman, Chief Judge, Presiding.

In the Matter of the Application of CARTER & WEEKS STEVEDORING CO., Petitioner-Respondent, for an order vs. JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Respondents-Appellants

ORDER SUBSTITUTING ATTORNEYS—June 1, 1945

On reading and filing the annexed certified copy of stipulation dated May 16, 1945, it is

Ordered, that Baldwin, Todd & Lefferts, Esqs., of No. 120 Broadway, New York, N. Y., be and they hereby are sub-

stituted as attorneys for the petitioner-respondent in the above entitled proceeding in the place and stead of Edwin V. Hellawell.

A Copy.

Raymond J. Cannon, Deputy Clerk (Seal of the Court of Appeals).

[fol. 118] In Supreme Court of New York, Appellate Division

In the Matter of the Application of Carter & Weekes Stevedoring Co., Petitioner-Respondent, for an Order

against

Joseph D. McGoldrick, Comptroller of the City of New York, and Ameriindo Portfolio, Treasurer of the City of New York, Respondents-Appellants

Stipulation re Substitution of Attorneys

It Is Hereby Stipulated and Consented that Messrs. Baldwin, Todd & Lefferts of No. 120 Broadway, New York, New York, be substituted as attorneys for petitioner-respondent Carter & Weekes Stevedoring Co. herein in place and stead of Edwin V. Hellawell.

Dated: New York, New York, May 16, 1945.

Edwin V. Hellawell, Attorney for Carter & Weekes Stevedoring Co.; C. E. Dougherty, Pres., Carter & Weekes Stevedoring Co.

[fol. 119] State of New York,
County of New York, ss:

On the 28th day of May, 1945, before me personally came C. E. Dougherty, to me known, who, being by me duly sworn, did depose and say that he resides at No. 388 West Shore Trail, Iparta, New Jersey; that he is the President of Carter & Weekes Stevedoring Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Michael J. Campinello, Notary Public, Kings County.

[fol. 120] IN COURT OF APPEALS OF NEW YORK

Witness, the Hon John T. Loughran, Senior Associate Judge, Presiding. John Ludden, Clerk.

In the Matter of the Application of CARTER & WEEKS STEVEDORING COMPANY, for an Order

against

JOSEPH D. McGOLDRICK, Comptroller of the City of New York & ano.

REMITTITUR—July 19, 1945

Be It Remembered, That on the 11th day of May in the year of our Lord one thousand nine hundred and forty-five, Joseph D. McGoldrick, Comptroller of the City of New York & ano., the appellants in this cause, came here unto the Court of Appeals, by Ignatius M. Wilkinson, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Carter & Weekes Stevedoring Company, the respondent in said cause, afterwards appeared in said Court of Appeals by Edwin V. Hellawell, its attorney

[fol. 121] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Mr. Edmund B. Hennefeld, of counsel for the appellants, and by Mr. Samuel M. Lane, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that local laws No. 22 of 1937, No. 20 of 1938, No. 103 of 1939 and No. 78 of 1940, adopted by the City of New York pursuant to Chapter 873 of the Laws of 1934 of the State of New York, as amended, are not contrary to, or in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States as applied to the taxing of receipts of the respondent from stevedoring operations. This court held to the contrary.

And it is also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said

Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the [fol. 122] form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE

Albany, July 19, 1945.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk (Seal of the Court of Appeals).

[fol. 123] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART II

Present: Hon. David W. Peck, Justice.

In the Matter of The Application of CARTER & WEEKES STEVEDORING COMPANY, Petitioner; For an Order Against JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Respondents

ORDER ON REMITTITUR—August 10, 1945

The above-named respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Almerindo Portfolio, as Treasurer of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the Order of the Appel-

late Division of the Supreme Court, First Department, dated the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 10th day of April, 1945, which Order annuls the determination of respondent, Joseph D. McGoldrick, with $50 costs and disbursements to the petitioner, and orders the [fol. 124] respondents, or either of them, to refund to petitioner the sum of $2,352.75, and the said appeal having been duly argued in the Court of Appeals and the said Court of Appeals having ordered and adjudged, on the 19th day of July, 1945, that said Order of the Appellate Division of the Supreme Court, First Department, be affirmed with costs, and a certified copy of the Order of said Court of Appeals having been duly filed in the office of the Clerk of the County of New York,

Now, on motion of Baldwin, Todd & Lefferts, attorneys for the petitioner, it is

Ordered, Adjudged and Decreed that the said Order of the Court of Appeals be, and it hereby is, made the Order of this Court, and the Clerk is hereby directed to enter judgment accordingly.

Enter.

D. W. P., J. S. C.

[fol. 125] In Supreme Court of New York, County of New York

[Title omitted]

Affidavit of Regularity

Samuel M. Lane, being duly sworn, deposes and says:

That deponent is a member of the firm of Baldwin, Todd & Lefferts, attorneys for the petitioner, and is familiar with the proceedings.

That the above named respondents appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945, annulling the determination of respondent McGoldrick.

That the Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, First Department. A certified copy of said order of affirmance is filed herewith.

That petitioner desires that the order of the Court of Appeals be made the order of this Court and that the Clerk be directed to enter judgment accordingly.

[fol. 126] That no other or previous application for the relief sought herein has been made to any Court of Judge.

Wherefore, deponent prays that said order of the Court of Appeals, affirming the order of the Appellate Division of the Supreme Court, First Department, be made the order of this Court, and that the Clerk be directed to enter judgment accordingly.

Samuel M. Lane.

Sworn to before me, this 9th day of August, 1945, Norman Hall Deyo, Notary Public. (Seal.)

[fol. 127] In Supreme Court of New York, County of New York

In the Matter of The Application of Carter & Weekes Stevedoring Company, Petitioner; For an Order Against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Judgment of Affirmance

The above-named respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Almerindo Portfolio, as Treasurer of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the Order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 10th day of April, 1945, and the Court of Appeals having, on the 19th day of July, 1945, ordered and adjudged that said Order of said Appellate Division be affirmed with costs, and an Order having been duly entered thereon on the 11th day of August, 1945, making said Order of the Court of Appeals the Order of this Court, and the remittitur of the Court of Appeals having been duly filed in the office of the Clerk of the County of New York, and said costs awarded by the Court of Appeals having been

duly taxed by the Clerk of this Court on the 17th day of August in the sum of $130.46, it is, on motion of Baldwin, Todd & Lefferts, attorneys for the petitioner,

[fol. 128] Adjudged that the Order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 10th day of April, 1945, be, and the same hereby is, in all respects affirmed, and it is further

Adjudged that the petitioner, Carter & Weekes Stevedoring Company, whose address is A-11-13 Produce Exchange, New York, New York, recover of the respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Almerindo Portfolio, as Treasurer of the City of New York, each of whose address is Municipal Building of the City of New York, Borough of Manhattan, City of New York, State of New York, the sum of $130.46, costs as taxed, and that said petitioner have execution therefor.

Dated: New York, New York, August 28, 1945.

Archibald R. Watson, Clerk.

[fol. 129] In Supreme Court of New York, New York County

[Title omitted]

Affidavit of No Opinion

State of New York,
County of New York, ss.:

John F. Kelly, being duly sworn, says that he is the Assistant Chief Clerk in the office of the Corporation Counsel of the City of New York, the attorney for the respondents-appellants in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John F. Kelly.

Sworn to before me this 28th day of September, 1945. Harry Stockfeder, Notary Public, Kings County, N. Y. (Seal.)

[fol. 130] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 131] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 19, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[fol. 132] [Endorsed on Cover:] File No. 50,221. New York, Supreme Court, Term No. 518. Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Petitioners, vs. Carter & Weekes Stevedoring Company. Petition for writ of certiorari and exhibit thereto. Filed October 17, 1945. Term No. 518, O. T. 1945.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 17 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

October 17, 1945.

IGNATZ M. WILKINSON,
ISAAC C. DONNER,
Counsel for Petitioners,
Municipal Building,
New York, N. Y.

HARRY KATZ,
of Counsel.

INDEX

PAGE

Petition:

Petitioners 1

Jurisdiction and Timeliness 2

The Statutes, the Validity of Which Is Involved 3

Opinions Below 4

Summary Statement of the Matter Involved 4

Question Presented 5

Assignment of Errors 5

Reasons for Allowance of the Writ 6

Brief:

Statement of the Case 10

Jurisdictional Statement and Assignment of Errors 11

Argument

I. Under the principles enunciated in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and an unbroken line of later cases the tax imposed upon respondent's gross receipts from its activities carried on exclusively within the City of New York is clearly valid under the Commerce Clause 12

The holding in the *Puget Sound* case 13

Puget Sound holding is irreconcilable with later decisions 14

Puget Sound case is in effect overruled by the later cases relied on by petitioners 15

PAGE

II. The New York City general business tax as applied to respondent's receipts is not barred by the Commerce Clause, since it is not an unconstitutional burden on interstate commerce 16

There is no discrimination 17

The tax is commensurate with the taxpayer's local activity 17

There is no possibility of an undue or multiple burden on interstate commerce 18

Conclusion 19

Appendix A. Provisions of local law 21

Appendix B. Provisions of State Enabling Act 38

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938) 12, 15

Allied Mills, Inc. v. Dept. of Treasury, 318 U. S. 740 (1943), *aff'g* 220 Ind. 340, 42 N. E. 2d 34 (1942) 12, 16

Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 269 App. Div. 685 (1945) 4

Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 294 N. Y. 906 (1945) 4

Clark & Son, Matter of John T., v. McGoldrick, 294 N. Y. 908 (1945) 2

Coverdale v. Pipeline Co., 303 U. S. 604 (1938) 12

Dept. of Banking v. Pink, 317 U. S. 264 (1942) 2

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252 (1941) 12

Dept. of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941) 12

PAGE

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) 8, 12, 14, 15, 17, 18

International Harvester Co. v. Dept. of Treasury, 322 U. S. 340 (1944) 12, 14, 16

McGoldrick v. Berwind-White Coal Mining Co., 308 U. S. 546 (1939) 2

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 12, 16

McGoldrick v. Compagnie Generale Transatlantique, 307 U. S. 620 (1939) 2

McGoldrick v. Gulf Oil Corp., 308 U. S. 545 (1939) 2

O'Kane v. State of New York, 283 N. Y. 439 (1940) 13*n*

Olive Coat Co., Matter of, v. McGoldrick, 287 N. Y. 769 (1942) 13*n*

Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937) 3, 6, 7, 8, 12, 13, 14, 15, 16

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 5, 8, 12, 13*n*, 14, 15, 18

Other Authorities Cited

LOCKHART, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40 (1943) 14

Index to Statutes Cited

PAGE

Administrative Code of the City of New York, Chap. 41—
- Title E, Art. 12 3
- Title O 3
- Title R 3, 11, 21-37

Laws of New York of 1934, Ch. 873 ..... 3, 4

Laws of New York of 1940, Ch. 245 ..... 4, 38-43

Local Laws of the City of New York—
- No. 22 of 1937 ..... 3, 11*n*
- No. 20 of 1938 3
- No. 103 of 1939 3
- No. 78 of 1940 ..... 3, 21-37

U. S. C. A., Title 28, §344, subd. (b) 2, 8

U. S. Constitution—
- Commerce Clause (Art. 1, §8, cl. 3) 1, 2, 6, 7, 8, 12, 13, 16, 19

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, respectfully shows:

1. Your petitioners are the Comptroller and Treasurer, respectively, of the City of New York, charged by law with the duty of administering and enforcing the tax laws here involved. The petition seeks review of a decision of the Court of Appeals of the State of New York holding that by virtue of the Commerce Clause of the United States Constitution (Art. 1, §8, cl. 3) the New York City general business tax may not be imposed upon respondent's gross receipts from its stevedoring activities carried on exclu-

sively within the territorial limits of the City of New York. The Court of Appeals stated in its decision that in deciding the matter this federal constitutional question was presented and necessarily passed upon by it (R. 121).

2. A companion case involving exactly the same question, *Matter of John T. Clark & Son* v. *McGoldrick*, 294 N. Y. 908 (1945), was decided simultaneously with the present case. A petition for certiorari in that case is being presented together with the present petition.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U. S. C. A. §344, subd. (b), and the Court has jurisdiction to grant the writ. *McGoldrick* v. *Compagnie Generale Transatlantique*, 307 U. S. 620 (1939); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 308 U. S. 546 (1939); *McGoldrick* v. *Gulf Oil Corp.*, 308 U. S. 545 (1939).

4. The decision of the Court of Appeals was handed down on July 19, 1945. On or about August 11, 1945, the remittitur was filed in the office of the County Clerk of New York County, who is the Clerk of the Supreme Court of the State of New York, New York County, and accordingly the remittitur is in the custody of the Supreme Court. A final order of the Supreme Court, New York County, was entered upon the remittitur on August 11, 1945. This petition is being presented within three months of the date of the decision of the Court of Appeals and is therefore timely. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942).

5. The decision of the Court of Appeals was based solely on the ground that the tax as applied violated the Com-

merce Clause of the federal Constitution (R. 121). At the hearing before the petitioner-Comptroller, to review the Comptroller's preliminary determination of tax liability, the taxpayer (respondent here) raised this ground of objection relying on the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937) (R. 26, 36-37, 95-96). Thereafter it was again raised in the proceeding brought by the respondent in the Appellate Division of the Supreme Court, First Department, to review Comptroller's final determination of tax liability (R. 13, 14, 26, 34). The Appellate Division sustained the objection and annulled the Comptroller's determination on the authority of the *Puget Sound* case, *supra* (R. 115). Upon appeal by the petitioners to the Court of Appeals this federal question was the only one presented. The Court of Appeals affirmed, saying: "A question under the Constitution of the United States was presented and necessarily passed upon" (294 N. Y. 906).

The Statutes, the Validity of Which Is Involved

6. The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1937 to 1940, Local Laws No. 22 of 1937, No. 20 of 1938, No. 103 of 1939, and No. 78 of 1940 (constituting Article 12 of Title E, Title O and Title R of Chapter 41 of the Administrative Code of the City of New York). All of these local laws were enacted pursuant to authority conferred by Laws of New York of 1934, ch. 873, as annually amended. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to State enabling acts authorizing them. The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code) which, so far as the issues here involved are concerned, are substantially the same as the

provisions of the other local laws involved, are printed as Appendix A. The provisions of the State enabling act pursuant to which that local law was enacted (Laws of New York of 1940, ch. 245, amending Laws of New York of 1934, ch. 873) are printed as Appendix B. The provisions of this act were somewhat different when the 1937 and 1938 local laws were enacted. The changes were necessitated by the new provisions in the New York State Constitution which became effective January 1, 1939. These changes, however, did not, and do not, in any way affect the questions raised or presented in this case.

Opinions Below

7. The memorandum opinion of the Appellate Division is reported in 269 App. Div. 685 (1945), and reads as follows:

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S. 90). Settle order on notice."

The memorandum affirmance of the Court of Appeals is reported in 294 N. Y. 906 (1945).

Summary Statement of the Matter Involved

8. The City general business tax is imposed without discrimination upon all persons engaged in or carrying on within the City any trade, business or profession. During the period involved, it was imposed at the rate of 1/10% on gross receipts received in or by reason of any sale made or service rendered in the City.

The taxpayer is a corporation with its principal office in the City of New York and is engaged in the general stevedoring business, consisting of loading and unloading ships' cargoes moving in interstate and foreign commerce. All of its activities are performed exclusively within the territorial limits of the City of New York. The taxpayer's receipts upon which the tax was imposed are derived solely and exclusively from these activities. These receipts cover only the taxpayer's own activities and nothing more. Since none of its activities is carried on outside the territorial limits of the City, it could not be subjected to tax on these activities or these receipts by any other state. If the taxpayer is exempted from the City general business tax, it would be free of all tax on its receipts from its stevedoring activities.

Question Presented

9. The following question is presented in this case: Does the New York City general business tax imposed upon the respondent's receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York constitute an unconstitutional burden on interstate commerce?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

(a) In failing to hold that the City general business tax was validly imposed upon respondent's receipts, under the recent decisions of this Court starting with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), cited in the brief annexed hereto, at page 12, *infra*.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the more recent principles enunciated by this Court in the cases above referred to, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination of general business tax liability against the respondent based upon its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) In holding the City general business tax law as applied to respondent's receipts from its wholly intracity stevedoring activities to be an unconstitutional burden on interstate commerce, the Court of Appeals has decided a federal question of substance in a way not in accord with the applicable decisions of this Court cited in the accompanying brief, for the Court of Appeals has held invalid a tax upon gross receipts received from interstate commerce which (1) does not in any way discriminate against or otherwise burden interstate commerce; and (2)

is measured by gross receipts derived solely and exclusively from activities which do not extend beyond the territorial limits of the City of New York.

(b) This case and its companion case are test cases upon the outcome of which depend many other cases involving substantially the same question. New York City is the foremost port, transportation and commercial center in the country. There are many and a great variety of substantial business concerns within the City engaged in promoting, servicing and transporting and delivering goods and passengers in interstate and foreign commerce, whose activities are either wholly, or to a substantial degree, carried on within the territorial limits of this City. These include stevedores, passenger and freight agents, selling and marketing agents, *etc.* The receipts from these businesses run into substantial sums and the general business tax on those receipts is of considerable consequence.

(c) Respondent and other persons engaged in wholly local activities connected with or contributing to interstate and foreign commerce enjoy all the benefits, advantages and services afforded and provided by the City of New York that are enjoyed by other persons carrying on business within the City unconnected with such commerce. The tax involved being limited to wholly local activity, it cannot possibly be duplicated in any other jurisdiction. Hence, the effect of the decision of the Court of Appeals is to exempt persons engaged in wholly local businesses connected with interstate commerce, from contributing a just share toward the cost of maintaining and furnishing local governmental services which they enjoy, and to transfer the whole load to other local businesses. The Commerce Clause was not intended to confer such preferences, and it should not be interpreted to yield such a result.

(d) The decision of this Court in *Puget Sound Co.* v. *Tax Commission, supra*, has in effect been overruled by

later cases involving the question of the effect of the Commerce Clause upon the taxing power of the States, cited in the attached brief, at page 12, *infra*, particularly *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), which involved the liability of a taxpayer engaged, as was the Puget Sound Stevedoring Company, in rendering services connected with the shipment and sale of merchandise in interstate commerce (*i.e.*, not a person shipping his own merchandise), under the same Washington gross receipts tax as was involved in the *Puget Sound* case. The States and localities should know the extent to which they may apply the general principles and doctrines enunciated by this Court in the *Western Live Stock* and subsequent cases in that line, and whether the *Puget Sound* case represents a limitation upon those doctrines.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York in and for the County of New York commanding that Court to certify and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. §344(b); and that the final order and judgment of the said Court and every part thereof may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States and that the said final order and judgment may be reversed and the Comptroller's original determination of tax liability on the part of the respondent confirmed; and petitioners pray for

such other and further relief as to this Court may seem just and proper, and the petitioners will ever pray.

Dated: New York, N. Y., October 17, 1945.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,

and

ALMERINDO PORTFOLIO,
Treasurer of the City of New York,
Petitioners.

by ISAAC C. DONNER,
Counsel for Petitioners,
Municipal Building,
Borough of Manhattan,
New York City.

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent is a corporation engaged in the business of general stevedoring, which consists of loading and unloading ships' cargoes moving in interstate and foreign commerce (R. 41-47, 51). Its sole office is in the City of New York (R. 57-59) and all its activities are performed solely and exclusively within the territorial limits of the City (R. 77, 91). None of those activities, nor any part of them, are carried on outside the territorial limits of the City (R. 91). All of the respondent's contracts for its services are made in New York City (R. 57-59). All of its property is situated

in the City (R. 75). The taxpayer is paid by its steamship company customers only for its stevedoring services. It is only these receipts from its own activities in the City that have been taxed.

The New York City general business tax law imposes a tax upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, chapter 41 of the Administrative Code, §R41-2.0). During the period involved it was imposed at the rate of 1/10% on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a further provision (§R41-2.0, par. b) to cover situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise. This provision authorizes the Comptroller to provide for allocation of such receipts so as to subject to tax only such part thereof as is properly attributable to the business done within the City.*

Jurisdictional Statement and Assignment of Errors

The Court will find these respectively at pages 2 and 5 of the petition, *supra*.

---

* This allocation provision was first added to the local laws in 1938. Local law No. 22 of 1937 does not have such a provision. Since respondent's activities are wholly within the City, this provision does not directly affect it.

POINT I

Under the principles enunciated in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and an unbroken line of later cases the tax imposed upon respondent's gross receipts from its activities carried on exclusively within the City of New York is clearly valid under the Commerce Clause.

Respondent's objection to the tax (R. 26, 36, 95), and the decisions of the Courts below rested solely upon *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). That case, insofar as it held invalid under the Commerce Clause a State tax on gross receipts from wholly local activities connected with interstate commerce, is at variance and irreconcilable with the numerous later decisions of this Court on that question.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938);
Coverdale v. *Pipeline Co.*, 303 U. S. 604 (1938);
Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938);
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939);
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940);
Dept. of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62 (1941);
Dept. of Treasury v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941);
Allied Mills, Inc. v. *Dept. of Treasury*, 318 U. S. 740 (1943); aff'g *per curiam* 220 Ind. 340, 42 N. E. 2d 34 (1942);
International Harvester Co. v. *Dept. of Treasury*, 322 U. S. 340 (1944).

The principles enunciated in these cases should be applied to the case at bar. This requires a reversal of the Court below.

The holding in the *Puget Sound* case

The *Puget Sound* case involved a gross receipts tax on wholly local stevedoring activities, as does the case at bar. The fact that stevedoring is involved in both cases is probably why the *Puget Sound* case was considered controlling by the Courts below.* This fact, however, is purely incidental, merely establishing that interstate commerce was involved. The real question was the effect of the Commerce Clause on the right of States to impose a tax on gross receipts from interstate commerce. So far as this question is concerned, the essential facts of the *Puget Sound* case are: (1) the taxpayer was engaged in an activity found by the Court to be in interstate commerce; and (2) the taxpayer's activity was confined wholly to the territorial limits of the taxing State, and the gross receipts taxed were derived from this wholly local activity. The *Puget Sound* case held the tax barred by the Commerce Clause.

The sum and substance of the *Puget Sound* decision is that persons engaged in a wholly local business in or connected with interstate commerce may not be subjected by the States to a tax on gross receipts from that business. Thus, the Court said (302 U. S., at p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. * * * The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor."

* This is indicated by the fact that although the Court of Appeals accepted and followed the doctrines of the *Western Live Stock* and later cases above cited, in *O'Kane* v. *State of New York*, 283 N. Y. 439 (1940), and *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942), the latter case involving the same New York City general business tax law as is here involved, it did not do so in the case at bar.

***Puget Sound* holding is irreconcilable with later decisions**

This position has been completely discarded by this Court in its later decisions. (See cases cited p. 12, *supra*.) The views of this Court as expressed in these later cases are stated as follows in *Gwin, White & Prince, Inc.* v. *Henneford, supra* (305 U. S., at pp. 438-439):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens, * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra,* and cases cited. But it is enough for present purposes that under the commerce clause * * * State taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

The law as thus laid down represents the repeatedly expressed views of this Court in an unbroken line of decisions and opinions in later cases from *Western Live Stock* v. *Bureau of Revenue, supra,* in 1938, to *International Harvester Company* v. *Dept. of Treasury, supra,* in 1944. The holding of the *Puget Sound* case is utterly irreconcilable with the law as established by these later cases. In this connection reference is also made to comments on the *Puget Sound* case in LOCKHART, *Gross Receipts Taxes on Interstate Transportation and Communication,* 57 Harv. L. Rev. 40 (1943), 64-65, 82.

Puget Sound case is in effect overruled by the later cases relied on by petitioners

The *Puget Sound* case, by contrast, has never been relied upon by this Court as authority for any of its subsequent decisions, and has in effect been overruled by the later cases. Its present ineffective status as precedent is markedly illustrated by the treatment accorded it by this Court in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* which involved the very same Washington tax (Washington Laws 1935, c. 180) as had been before this Court in the *Puget Sound* case. Moreover, the taxpayer in the *Gwin, White & Prince* case, a company which marketed in other States and foreign countries fruit grown by Washington growers, was engaged, as was the Puget Sound Stevedoring Company, in a service "in aid of the shipment and sale of merchandise in that [interstate] commerce * * * [which] services are within the protection of the commerce clause * * *" (305 U. S. at p. 437).

The taxpayer in that case relied upon and cited the *Puget Sound* case. This Court in the *Gwin, White & Prince* case, in reaching the same result of invalidity as in the *Puget Sound* case, did not in its opinion even mention the *Puget Sound* case. That the *Puget Sound* case was rejected as authority by this Court is further indicated by the fact that Justices BUTLER and MCREYNOLDS, who concurred in the result of invalidity in the *Gwin, White & Prince* case, based their conclusion upon the doctrines of the *Puget Sound* case, and cited that case. However, as stated, the majority of this Court, without mentioning the *Puget Sound* case, cited and relied upon the doctrines of the cases upon which petitioners herein rely.

The only inference that can be drawn from these facts is that this Court rejected the *Puget Sound* case as controlling authority, and instead adopted and applied to the *Gwin, White & Prince* case, the principles and rationale it had enunciated and applied in the earlier *Western Live Stock* and *Adams Mfg. Co.* cases, *supra.* It has repeatedly done so in other cases decided since that time. *McGoldrick*

v. *Berwind-White Coal Mining Co., supra; Dept. of Treasury* v. *Ingram-Richardson Mfg. Co., supra; Allied Mills, Inc.* v. *Dept. of Treasury, supra; International Harvester Co.* v. *Dept. of Treasury, supra.* Under the circumstances the *Puget Sound* case has been in effect overruled.

The only other question remaining is whether the tax in the case at bar meets the test of validity under the Commerce Clause as laid down in the *Western Live Stock* and the other cases which petitioners cite and rely upon.

POINT II

The New York City general business tax as applied to respondent's receipts is not barred by the Commerce Clause, since it is not an unconstitutional burden on interstate commerce.

Under the recent cases cited at page 12, *supra,* wherein this Court set forth the applicable principles for determining the validity of State gross receipts taxes under the Commerce Clause, it is settled that: (1) persons doing business in, or connected with interstate or foreign commerce, are not immune from all taxes on their gross receipts; (2) such taxes are invalid under the Commerce Clause only if they discriminate against interstate commerce or result in the possibility of cumulative multiple tax burdens merely because interstate business is being done; (3) the possibility of cumulative multiple tax burdens is avoided as to such taxes by basing the tax either on the receipts from the particular activity locally carried on or, if the activity extends beyond State lines, upon a portion of the over-all gross receipts determined by formula to be commensurate with the activity locally carried on.

On the basis of these principles the tax at bar is clearly valid. It is not discriminatory; it is properly commensurate with activity carried on locally; and there is no possibility of cumulative multiple tax burdens.

There is no discrimination

The tax here involved is a general business tax. It applies without discrimination to all persons who are carrying on business within the City. The same rate of tax is imposed upon all persons and the same tax base—gross receipts—is used for all persons. The tax does not apply only to persons engaged in interstate and foreign commerce, nor does it apply to such persons at a higher rate or in any respect more onerously than to persons engaged in purely domestic business. The lack of discriminatory intent and the scrupulous regard for the right of persons engaged in interstate and foreign commerce is manifested by the special provision requiring that where taxation of a receipt in its entirety is barred by the Constitution, a proper apportionment shall be made. There can be no question, therefore, that there is no discrimination either as against persons engaged in foreign and interstate commerce generally or against this taxpayer in particular.

The tax is commensurate with the taxpayer's local activity

The receipts in question arise out of the respondent's wholly local business activity. No part thereof is earned or contributed to by any activity outside the City. Hence, no allocation or apportionment is required to avoid the possibility of undue burden or multiple taxation, for it is clear that these receipts properly reflect the activity, and only the activity carried on within the City of New York. A tax, therefore, based upon these receipts is obviously commensurate with the respondent's local activity within the City of New York and cannot in any way be ascribed to, or regarded as being reflective of, any extracity activity. The fact that this activity is in interstate commerce or that the receipts arise out of participation in interstate commerce does not bar the tax. See cases cited page 12, *supra*. See also quotation from *Gwin, White &*

Prince, Inc. v. *Henneford, supra,* at page 14, *supra.* "Even interstate business must pay its way," *Western Live Stock* v. *Bureau of Revenue, supra,* p. 254; *Gwin, White & Prince, Inc.* v. *Henneford, supra,* p. 438.

There is no possibility of an undue or multiple burden on interstate commerce

The tax here involved does not impose any affirmative impediment to the conduct of interstate business. The carrying on of such business is not conditioned upon the payment of the tax. No licensing requirement is imposed by the law. Failure to pay the tax does not bar a person from carrying on his business or from engaging in business activity within the City.

In the case at bar there is no possibility of a burden of cumulative multiple taxation. The respondent is engaged in business only in the City of New York. It has no place of business elsewhere. It has no property elsewhere. The services from which the receipts subjected to tax arise are performed wholly within the territorial limits of the City. It is, therefore, impossible for the tax here involved to be a burden "of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it [taxpayer] would bear cumulative burdens not imposed on local commerce" (*Western Live Stock* v. *Bureau of Revenue, supra,* pp. 255-256).

Unless the tax at bar is sustained, this respondent and persons similarly situated who engage or participate locally in activities in interstate commerce will be absolved from payment of any tax on gross receipts. The effect of this, of course, will be to impose a heavier tax burden upon persons engaged in local business not regarded as in interstate commerce, though the benefits, advantages and services afforded by the City are enjoyed equally by both

groups of persons. While the Commerce Clause may be used to prevent the imposition of undue and multiple burdens upon persons engaged in interstate commerce, it is surely not intended to absolve such persons from paying a just share of the cost of local government and to impose a heavier burden upon persons not engaged in interstate commerce.

CONCLUSION

The Commerce Clause does not require that gross receipts from interstate commerce be exempt from local taxes. Such taxes are permissible if based upon gross receipts arising out of an activity carried on wholly within the taxing jurisdiction or, where the activity extends beyond State lines, upon such part of the receipts as is fairly commensurate with the activity locally carried on. Such a tax, either on gross receipts resulting from a wholly local activity, or from an allocable portion of the gross receipts if the activity extends beyond State lines, is not an undue burden on interstate commerce, since it cannot in point of substance be imposed by any other State.

The tax at bar is properly commensurate with a wholly local activity and is one which cannot be duplicated in any other jurisdiction. It is one that is imposed without discrimination of any kind. Therefore, this tax is not barred by the Commerce Clause.

Moreover, persons engaged in interstate commerce should be required to pay their way by contributing their share toward the cost of local government, whose benefits and services they enjoy. Local business men not in interstate commerce should not be forced to bear extra tax burdens for benefits and services which they enjoy on a parity

with their fellow business men engaged in interstate commerce, because the latter are absolved from the payment of their share of the cost of providing such benefits and services.

The petition for certiorari should be granted.

Dated: New York, N. Y.
October 17, 1945.

Respectfully submitted,

IGNATIUS M. WILKINSON,
ISAAC C. DONNER,
Counsel for Petitioners.

HARRY KATZ,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1940

No. 78

A LOCAL LAW to amend the administrative code of the city of New York, in relation to raising revenue for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by re-enacting and imposing a tax upon the privilege of carrying on or exercising, for gain or profit, within the city of New York, any trade, business, profession, vocation, commercial activity or financial business, or of making sales to persons within such city, and extending the time during which such tax shall be imposed.

Became a law June 29, 1940, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the Council as follows:

Section 1. Title R of chapter forty-one of the administrative code of the city of New York, as added by local law number one hundred three for the year nineteen hundred thirty-nine, is hereby amended to read as follows:

Appendix A

TITLE R

General Business and Financial Tax

§R41-1.0. **Definitions.** When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deductions therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

Appendix A

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

Schedule A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Appendix A

Receipts of a non-profit membership corporation for the purpose of holding a world's fair and confining its operations solely to preparing for and conducting such fair.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer". The treasurer of the city.

§R41-2.0. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section R41-1.0 of this title, for gain or profit within the city for eachof the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise

tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which such period shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this provision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of the calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year from the date when he became so engaged; and if such person shall not have been so engaged for an entire year prior to June

thirtieth of the year in which the tax imposed by this title becomes due and payable, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred thirty-nine, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§R41-3.0. **Presumption and burden of proof.** For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§R41-4.0. **Filing of returns.** Every person subject to tax under this title shall on or before the fifteenth day of June of the years in which the one-year periods referred to in subdivision a of section R41-2.0 of this title shall end, file a return under oath with the treasurer, except that any person required to file a return for a period beyond the first day of May of any such year may file such return on or before the first day of August thereof. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or treasurer or their duly author-

ized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this title pertaining to his receipts. Whenever the treasurer shall require supplemental returns, he shall promptly notify the comptroller thereof.

§R41-5.0. **Payment of tax.** At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§R41-6.0. **Determination of tax.** If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller and treasurer they shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller and treasurer shall of their own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such

determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§R41-7.0. **Refunds.** In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section R41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section R41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as pro-

vided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§R41-8.0. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section R41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§R41-9.0. **Remedies exclusive.** The remedies provided by sections R41-6.0 and R41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or pro-

ceeding other than proceedings under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section R41-6.0 of this title.

§R41-10.0. **Proceedings to recover tax.** a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provision of this title or of articles eight to twelve inclusive of title E of chapter forty-one of the code is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the sheriff of any county within the city, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the

tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§R41-11.0. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller or other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§R41-12.0. **General powers of the treasurer.** In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§R41-13.0. **Administration of oaths and compelling testimony.** a. The comptroller or treasurer or his employee duly designated and authorized by them shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, and punishment

for which shall be of a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the sheriffs of the counties within the city, and their duly appointed deputies.

§R41-14.0. **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section R41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or

imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the comptroller or treasurer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§R41.15.0. **Notices and limitations of time.** a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the

amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§R47-16.0. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

Appendix A

§R41-17.0. **Separability.** If any provision of this title, or the application thereof to any person or circumstances is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§R41-18.0. **Construction and enforcement.** This title shall be construed and enforced in conformity with chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four as amended, pursuant to which it is enacted.

§2. This local law shall take effect July first, nineteen hundred forty.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1940

CHAPTER 245

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," in relation to authorizing specified types of taxes for relief and welfare and providing for the review thereof

Became a law March 30, 1940, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to im-

pose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," as last amended by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, are hereby amended to read as follows:

Section 1. Notwithstanding any other provisions of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred forty-one to adopt and amend local laws imposing in any such city any or all of the following types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, such taxes to be collected and administered by the fiscal officers of such city in the same manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city: (a) Taxes on the use, sale, exchange, transfer, storage, withdrawal, retention, installation or license to use or consume tangible personal property, other than, on or after July first, nineteen hundred forty, cigarettes.

(b) Taxes on the privilege of doing any business, engaging in any trade, calling, occupation or profession; owning, holding or occupying any property; possessing or exercising any franchise or franchises; or on the gross receipts from sales to persons within such city.

(c) Taxes on the sale or performance of services including utility services but excluding professional services.

The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen

hundred forty-one, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons, or upon the gross income from the operation of hotels, multiple dwellings or office buildings by persons in the business of operating or leasing sleeping or parlor railroad cars or of operating railroads other than street surface, rapid transit, subways and elevated railroads, or upon gross incomes or gross operating incomes of persons subject to taxation under the provisions of section one hundred eighty-six-a of the tax law, except in accordance with the provisions of section twenty-b of the general city law; or upon interest or dividends received from a corporation by a person referred to in this paragraph.

This act shall not authorize the imposition of a tax on any transaction, originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

Except as expressly otherwise in this act provided, nothing herein contained shall limit or prevent the imposition

of a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such city.

No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts for the privilege of doing business under the provisions of this act.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and an undertaking filed, in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected an application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice act, provided, however, that such

proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made with respect to taxes imposed under local laws enacted prior to July first, nineteen hundred thirty-eight, after July first, nineteen hundred forty-one, and with respect to taxes imposed under local laws enacted subsequent to July first, nineteen hundred thirty-eight, after the expiration of more than three years from the date of the filing of a return, provided however, that where no return has been filed as provided by law the tax may be assessed at any time.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred thirty-three; for defraying the cost of collecting and administering such taxes, but not in excess of such cost, during the year immediately preceding; and for the relief purposes for which such taxes have been imposed under the provisions of this act.

Notwithstanding the foregoing limitations, a sum not to exceed four million five hundred thousand dollars may be expended for old age assistance by any such city from the taxes imposed and collected hereunder prior to the first day of July, nineteen hundred forty.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes imposed under this act and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its welfare or other department.

The provisions of this act shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary, and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§2. This act shall take effect immediately.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR PETITIONERS

January 23, 1946.

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners,
Municipal Building,
New York 7, N. Y.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
1. Facts	3
2. The Tax Statutes Here Involved	3
3. Provisions of Statutes Involved	4
4. History of the Tax Involved	5
Specification of Errors	6
The Issue	7
Summary of Argument	8
POINT I—The basic principles for determining the validity of State or local taxes under the Commerce Clause require that the right of the States to effectuate their fiscal policies be reconciled with the authority of the Federal Government to regulate interstate and foreign commerce, and that a State or local tax be invalidated only if in fact and in practical operation it regulates that commerce by discriminating against it or subjecting it to possible multiple tax burdens	10
a. The States are free to carry out their tax programs without undue constitutional restrictions, and this Court will reconcile, wherever possible, State and federal interests	11

PAGE

b. State action or taxes are invalid under the Commerce Clause only if they regulate interstate or foreign commerce, *i.e.*, if that commerce is interfered with, discriminated against or subjected to possible multiple burdens 13

c. Whether a State tax constitutes a regulation of interstate commerce depends upon the facts in each case 14

POINT II—The holdings of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases, comply with the basic principles for determining the validity of State taxes under the Commerce Clause, whereas *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), does not. The *Western Live Stock* and later cases, therefore, should be regarded as determinative of the validity of the tax at bar 15

a. The holdings of the *Western Live Stock* and subsequent cases 15

b. The holding of the *Puget Sound* case 19

c. The *Puget Sound* holding is not in accord with the basic principles and has, in effect, been rejected and overruled, particularly in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939) 21

POINT III—The tax at bar is valid under the Commerce Clause. It is non-discriminatory, commensurate with and reflective only of purely local activity, and is not susceptible of being duplicated in any other jurisdiction 24

a. The tax is non-discriminatory 25

PAGE

b. The tax is commensurate with the respondent's local activity 25

c. The tax raises no possibility of an undue or multiple burden on interstate commerce 26

Point IV—The invalidation of this tax will result in discrimination against intrastate commerce and will impede the carrying out of the State and City fiscal program 27

Conclusion 30

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938) 8, 17, 18, 19, 20

Allied Mills, Inc. v. Dept. of Treasury, 318 U. S. 740 (1943), *aff'g* 220 Ind. 340 (1942) 18

Baldwin v. Seelig, 294 U. S. 511 (1935) 13

Best & Co., Inc. v. Maxwell, 311 U. S. 454 (1940) 14, 18, 19

Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 294 N. Y. 906 (1945) 2

Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 269 App. Div. 685 (1945) 2

Coverdale v. Pipeline Co., 303 U. S. 604 (1938) 18

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252 (1941) 18

Dept. of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941) 18

Galveston, H. & S. A. Ry. Co. v. Texas, 210 U. S. 217 (1908) 13

PAGE

General Trading Co. v. Tax Commission, 322 U. S. 335 (1944) 11, 14, 18

Gibbons v. Ogden, 9 Wheat. 1 (1824) 13

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) 8, 9, 16, 17, 18, 19, 20, 21; 22, 23, 24, 26

Henneford v. Silas Mason Co., 300 U. S. 577 (1937) 14

Hump Hair Pin Co. v. Emmerson, 258 U. S. 290 (1922) 14

International Harvester Co. v. Dept. of Treasury, 322 U. S. 340 (1944) 18, 27

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 6, 8, 11, 13, 14, 17, 18, 20

McGoldrick et al. v. John T. Clark & Son, No. 519 3

McLeod v. Dilworth Co., 322 U. S. 327 (1944) 18, 19

Nelson v. Sears, Roebuck & Co., 312 U. S. 359 (1941) 11, 14, 15

New York Rapid Transit Co. v. City of New York, 303 U. S. 573 (1938) 6

O'Kane v. State of New York, 283 N. Y. 439 (1940) 20

Olive Coat Co., Matter of, v. McGoldrick, 287 N. Y. 769 (1942) 20

Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937) 7, 8, 9, 10, 11, 15, 19, 20, 21, 22, 23, 24, 30

Southern Pacific Co. v. Gallagher, 306 U. S. 167 (1939) 14, 18

Union Brokerage Co. v. Jensen, 322 U. S. 202 (1944) 11, 13

United States v. South-Eastern Underwriters Assn., 322 U. S. 533 (1944) 13, 14

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20, 21, 22, 24, 26, 27, 28, 29

Wisconsin v. J. C. Penney Co., 311 U. S. 435 (1940) 11, 12

Other Authorities Cited

PAGE

LOCKHART, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40 (1943) 17

LOCKHART, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253 (1940) 17

POWELL, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909 (1940) 17

Report, Commission on Municipal Revenues and Reduction of Real Estate Taxes (March 13, 1945) 5

Rules and Regulations, Police Department of the City of New York (1940) 28*n*

Seventy-fifth Annual Report, Fire Department of the City of New York (1940) 28*n*

The New York Times:

Oct. 3, 1945, p. 15, col. 2 ..... 28*n*
Oct. 6, 1945, p. 3, col. 2 ..... 28*n*
Oct. 12, 1945, p. 1, col. 1 ..... 28*n*
Oct. 13, 1945, p. 1, col. 8 ..... 28*n*
Oct. 15, 1945, p. 1, col. 8 ..... 28*n*
Oct. 16, 1945, p. 1, col. 8 ..... 28*n*
Oct. 17, 1945, p. 1, col. 8 ..... 28*n*
Oct. 18, 1945, p. 1, col. 8 ..... 28*n*

Statutes Cited

PAGE

Administrative Code of the City of New York, Chap. 41:

Title E, Article 12 3
Title O 3
Title R 3, 4

New York City Laws:

Local Law No. 9 of 1934 5
Local Law No. 22 of 1937 ..... 3, 5
Local Law No. 20 of 1938 3
Local Law No. 103 of 1939 3
Local Law No. 78 of 1940 ..... 3, 4

New York Constitution:

Article XVI, Section 1 ..... 4n

New York Laws:

Civil Practice Act, Art. 78 2
Laws of 1933, ch. 815 5
Laws of 1934, ch. 302 5
Laws of 1934, ch. 873 4
Laws of 1937, ch. 327 4
Laws of 1938, ch. 444 4
Laws of 1939, ch. 659 4
Laws of 1940, ch. 245 ..... 4, 5
Laws of 1944, ch. 382 5

United States Code, Tit. 28, Sec. 344, subd. (b) 2

United States Constitution:

Commerce Clause (Art. 1, §8, cl. 3) 2, 7, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 20, 21, 24, 25, 27, 28, 29, 30

Washington Laws of 1935, ch. 180 22

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

---

BRIEF FOR PETITIONERS

A writ of certiorari was granted by this Court on November 19, 1945, to review a final order of the Court of Appeals of the State of New York (R. 79-80) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 76), which nullified a determination of the petitioner-Comptroller assessing respondent for taxes upon its gross receipts under the New York City general business tax laws for the years 1937 to 1940 in the sum of $2,352.75, inclusive of interest and penalties (R. 10).

The Court of Appeals nullified the Comptroller's determination upon the sole ground that the application of the New York City general business tax to the respondent's stevedoring business constituted a violation of the Commerce Clause (Art 1, §8, cl. 3) of the Federal Constitution (R. 79).

Opinions Below

The Court of Appeals affirmed the determination of the Appellate Division without opinion. Its memorandum of affirmance is reported in 294 N. Y. 906 (1945).

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, before which the proceedings to review the Comptroller's determination were heard in the first instance (R. 1-2), pursuant to Article 78 of the New York Civil Practice Act, is reported in 269 App. Div. 685 (1945) and reads as follows (R. 77):

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90)."

Jurisdiction

The jurisdiction of this Court arises under U. S. Code, Title 28, §344, subd. (b). The decision of the Court of Appeals was based solely upon the ground that the tax as applied to respondent violated the Commerce Clause (R. 79). The decision of the Court of Appeals was rendered on July 19, 1945 (R. 79). The petition in this Court was filed on October 17, 1945 (R. 84), within three months of the decision of the Court of Appeals.

The petition was granted on November 19, 1945 (R. 84), concurrently with the granting of the petition filed by petitioners in *McGoldrick et al.* v. *John T. Clark & Son*, No. 519, which involves exactly the same question and will be argued at the same time as this case.

Statement of the Case

1. Facts

The respondent is a corporation engaged in the business of general stevedoring which consists of loading and unloading ships' cargoes moving in interstate and foreign commerce (R. 26-30, 33). Its sole office is in the City of New York (R. 37-38), and all its activities are performed solely and exclusively within the territorial limits of the City (R. 38-39, 53, 64). None of those activities, nor any part of them, is carried on outside the territorial limits of the City (R. 64). All of the respondent's contracts for its services are made in New York City (R. 30-31, 38-41, 68-72). All of its property is situated in the City (R. 51). The respondent is paid by its steamship company customers only for its stevedoring services. Only these receipts from its own activities in the City have been taxed (R. 30-31, 68-72).

2. The Tax Statutes Here Involved

The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1937 to 1940, Local Laws No. 22 of 1937, No. 20 of 1938, No. 103 of 1939 and No. 78 of 1940 (constituting Article 12 of Title E, and Title O and Title R of Chapter 41 of the Administrative Code of the City of New York). The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code) which, so far as the issues herein are concerned, are substantially the same as the provisions of the other local laws involved,

are set out in full as Appendix A in the Appendix of Statutes to be submitted herewith.

All these local laws were enacted pursuant to authority conferred upon the City of New York by Laws of New York of 1934, Chapter 873, as annually amended in each of the years 1937 to 1940, inclusive (L. 1937, ch. 327; L. 1938, ch. 444; L. 1939, ch. 659; L. 1940, ch. 245). The provisions of the State enabling act pursuant to which Local Law No. 78 of 1940 was enacted (L. 1940, ch. 245) are set out in full as Appendix B in the Appendix of Statutes. The other enabling acts differ somewhat from the 1940 enabling act. These differences, however, did not and do not in any way affect the questions raised or presented in this case.*

3. Provisions of Statutes Involved

The New York City general business tax is imposed upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, ch. 41 of the Administrative Code, §R41-2.0 [Appendix A]). During the period involved it was imposed at the rate of 1/10% on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a provision (§R41-2.0, par. b) authorizing the Comptroller, in situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise, to provide for allocation of such receipt "to the end that only that part of

* The provisions of the 1940 enabling act are substantially the same as those of the 1939 act, but differ somewhat from those of the 1937 and 1938 acts. The changes from the 1937 and 1938 acts were made necessary by a new provision of the New York State Constitution (Article XVI, Section 1), effective January 1, 1939. These changes do not affect the issues in this case.

such receipt which is properly attributable and allocable to the doing of business in the City shall be taxed hereunder". This allocation provision is in every local law here involved except the 1937 law (L. L. 22 of 1937). Since all respondent's business is done within the City of New York, all its receipts are attributable to such local business without recourse to this allocation provision. The respondent, therefore, is not affected by this provision.

1. History of the Tax Involved

The first New York City general business tax was imposed by Local Law No. 9 of 1934, enacted pursuant to authority conferred by Laws of New York of 1934, ch. 302. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to subsequent State enabling acts authorizing them.

The first such enabling act was passed in 1933 (L. 1933, ch. 815). No general business tax was imposed by the City under this first enabling act. Prior to these enabling acts, the City's taxing authority was limited to taxes on real estate. The enabling acts extended the City's taxing authority, permitting it to impose other types of taxes in order "to relieve the people from the hardships and suffering caused by unemployment" (see, *e.g.*, L. 1940, ch. 245 [Appendix, p. 18]). The City's need for additional tax revenue from sources other than real property is reflected in the following excerpt from the report, dated March 13, 1945, of the Commission on Municipal Revenues and Reduction of Real Estate taxes (created by L. 1944, ch. 382),* at page 15:

---

*The problem of relieving real estate of the burden of taxation in New York State has been the subject of legislative and other official study for many years. The Commission referred to is the last of many which considered the problem. During the period from 1916 to 1938 twenty-one commissions were appointed to devise a more equitable revenue system for the State and its subdivisions. Since 1938 several other commissions have inquired into one or more phases of the subject. See Report, Commission on Municipal Revenue and Reduction of Real Estate Taxes, March 13, 1945, p. 11.

> "With declining assessed valuations and sharply curtailed income from shared taxes, the municipalities found themselves confronted with the necessity of raising the moneys required not only to meet their normal costs of government but also to pay the debt service upon the huge borrowings accumulated in the twenties and to provide vastly increased relief and welfare services to their citizens. Real estate tax delinquencies pyramided rapidly."

And further, at page 20:

> "Experience in the depression years demonstrates that the gap between mounting costs and declining revenues cannot, and should not, be bridged by imposing upon real estate an additional burden of debt and taxation."

The general business tax here involved is one of a series of taxes which the City of New York enacted pursuant to the enabling legislation. These taxes include, amongst others, the New York City sales tax which was reviewed and upheld by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and the New York City utility tax which was reviewed and upheld by this Court in *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938).

All of these taxes have been continued up to the present time by reenactment under periodic extensions of the enabling acts. In 1942 the restriction, which until then limited the use of the revenues from these taxes for relief purposes only, was lifted. Since that time the City has been permitted to treat the revenues as part of its general funds, thus making possible the reduction of the real estate tax load borne by local real property owners.

Specification of Errors

Petitioners contend that the Court of Appeals erred:

(a) In failing to hold that the New York City gener. business tax was validly imposed upon respondent's

receipts, under the recent decisions of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and later cases.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the principles enunciated in *Western Live Stock* v. *Bureau of Revenue, supra*, and subsequent cases, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination of general business tax liability against the respondent based upon its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

The Issue

The question presented is whether the New York City general business tax imposed upon the respondent's gross receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York is invalid under the Commerce Clause.

Respondent contends that the holding of *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937),* is decisive

* In the *Puget Sound* case the State tax there involved was held valid as to certain activities of the taxpayer regarded by the Court as not in interstate commerce. The tax was held invalid as to the taxpayer's stevedoring activities which were held to be interstate commerce (See 302 U. S., at 94). It is only the latter holding which is pertinent to the instant case. Where the *Puget Sound* holding or decision, etc., is referred to in this brief, it is the latter holding only that is intended.

of this case and that under that holding the tax here involved is invalid.

Petitioners contend that the case at bar is controlled by holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases including, *inter alia*, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), and *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and that under these cases the tax is valid. Petitioners contend also that the *Puget Sound* case has been rejected as authority and in effect overruled.

Summary of Argument

The New York City general business tax, which applies generally and without discrimination to all business activities carried on within the City, is properly imposed upon the respondent's gross receipts from its stevedoring activities carried on solely and exclusively within the City. The tax is not barred by the Commerce Clause because it does not regulate interstate commerce. The tax does not discriminate against interstate commerce, is commensurate only with wholly local activity, and does not subject that commerce to the possibility of multiple tax burdens. The tax merely exacts from interstate commerce the same fair contribution toward the support of local government as is exacted from intrastate business.

This case is controlled by the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and subsequent cases, and not by the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). The *Western Live Stock* and later cases comply with the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause, whereas the *Puget Sound* case fails to comply with those basic principles. Moreover, the *Puget Sound* case has in effect been rejected and overruled by this Court.

We shall develop the argument under the following points:

POINT I

The basic principles for determining the validity of State or local taxes under the Commerce Clause require that the right of the States to effectuate their fiscal policies be reconciled with the authority of the Federal Government to regulate interstate and foreign commerce, and that a State or local tax be invalidated only if in fact and in practical operation it regulates that commerce by discriminating against it or subjecting it to possible multiple tax burdens.

a. The States are free to carry out their tax programs without undue constitutional restrictions, and this Court will reconcile, wherever possible, State and federal interests.

b. State action or taxes are invalid under the Commerce Clause only if they regulate interstate or foreign commerce, *i.e.*, if that commerce is interfered with, discriminated against or subjected to possible multiple burdens.

c. Whether a State tax constitutes a regulation of interstate commerce depends upon the facts in each case.

POINT II

The holdings of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases, comply with the basic principles for determining the validity of State taxes under the Commerce Clause, whereas *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), does not. The *Western Live Stock* and later cases, therefore, should be regarded as determinative of the validity of the tax at bar.

a. The holdings of the *Western Live Stock* and subsequent cases.

b. The holding of the *Puget Sound* case.

c. The *Puget Sound* holding is not in accord with the basic principles and has, in effect, been rejected and overruled, particularly in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

POINT III

The tax at bar is valid under the Commerce Clause. It is non-discriminatory, commensurate with and reflective only of purely local activity, and is not susceptible of being duplicated in any other jurisdiction.

a. The tax is non-discriminatory.

b. The tax is commensurate with the respondent's local activity.

c. The tax raises no possibility of an undue or multiple burden on interstate commerce.

POINT IV

The invalidation of this tax will result in discrimination against intrastate commerce and will impede the carrying out of the State and City fiscal program.

POINT I

The basic principles for determining the validity of State or local taxes under the Commerce Clause require that the right of the States to effectuate their fiscal policies be reconciled with the authority of the Federal Government to regulate interstate and foreign commerce, and that a State or local tax be invalidated only if in fact and in practical operation it regulates that commerce by discriminating against it or subjecting it to possible multiple tax burdens.

The question presented in this case is, as indicated, whether a State tax, such as that here involved, imposed upon gross receipts from wholly local activity in interstate commerce, is invalid under the Commerce Clause. *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), held in effect that such gross receipts from interstate commerce were absolutely immune from State taxation. On the other hand, *Western Live Stock* v. *Bureau of Revenue*, 303 U. S.

250 (1938), and later cases hold in effect that States may tax such gross receipts from interstate commerce if the tax does not constitute a regulation of that commerce.

The *Puget Sound* holding is irreconcilable with that of the *Western Live Stock* and later cases. It is thus necessary to decide which properly states the law applicable to the determination of the question presented in this case. It is submitted that that holding is to be regarded as applicable which conforms to the basic principles which this Court has laid down for determining the validity of State or local taxes under the Commerce Clause.

We, therefore, proceed to an examination of these basic principles (POINT I). Thereafter (in POINT II), we shall examine the holding in the *Puget Sound* case and the holdings in the *Western Live Stock* and later cases in the light of these basic principles, and show that the holdings in the *Western Live Stock* and the later cases conform to those basic principles while the *Puget Sound* holding does not.

a. The States are free to carry out their tax programs without undue constitutional restrictions, and this Court will reconcile, wherever possible, State and federal interests.

The New York City general business tax is part of a fiscal program designed to relieve the tax burden borne by real property within the City by imposing other taxes which spread the burden more widely among persons and businesses generally within the City. (See pp. 5-6, *ante*.) Such a change or adjustment in tax policy is wholly within the discretion and judgment of the State itself. It is only the practical effect of the tax which determines whether it intrudes upon federal constitutional prerogatives. *General Trading Co.* v. *Tax Commission*, 322 U. S. 335, 338 (1944); *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202, 209-210 (1944); *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363 (1941); *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 444-445 (1940); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48 (1940).

In *Wisconsin* v. *J. C. Penney Co.*, *supra*, this Court said (311 U. S., at p. 444):

> "For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society."

And at page 445:

> "At best, the responsibility for devising just and productive sources of revenue challenges the wit of legislators. Nothing can be less helpful than for courts to go beyond the extremely limited restrictions that the Constitution places upon the states and to inject themselves in a merely negative way into the delicate processes of fiscal policy making. We must be on guard against imprisoning the taxing power of the states within formulas that are not compelled by the Constitution but merely represent judicial generalizations exceeding the concrete circumstances which they profess to summarize."

Furthermore, where State action touches a federal sphere of action, the courts will attempt to harmonize the rights and interests of the State and Federal Governments and so far as possible accommodate one to the other without sacrificing either.

> "In few of these cases could it be said with assurance that the local tax does not in some measure affect the commerce or increase the cost of doing it. But in them as in other instances of constitutional interpretation so as to insure the harmonious operation of powers reserved to the states with those conferred upon the national government, courts are called upon to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes

for the support of state government shall not be unduly curtailed."

McGoldrick v. *Berwind-White Coal Mining Co.*, *supra*, at 48.

See also:

United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 548 (1944).
Union Brokerage Co. v. *Jensen*, *supra*; at 207-208.

b. State action or taxes are invalid under the Commerce Clause only if they regulate interstate or foreign commerce, *i.e.*, if that commerce is interfered with, discriminated against or subjected to possible multiple burdens.

The Commerce Clause does not expressly or directly restrict the inherent taxing power of the States. A State tax offends the Commerce Clause only if it can be regarded as impinging on the power of Congress to "regulate commerce with foreign nations, and among the several states . . . ." *Gibbons* v. *Ogden*, 9 Wheat. 1, 199-200 (1824); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 45 (1940).

The fact that State action affects interstate commerce or increases the cost of doing business is not sufficient to invalidate it as a regulation of that commerce. *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944), at 209; *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at 48; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 254 (1938); *Baldwin* v. *Seelig*, 294 U. S. 511, 525 (1935); *Galveston, H. & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217, 225, 227 (1908). Only State action which tends to obstruct or impede interstate commerce, or which discriminates against it or subjects it to disadvantages or burdens not borne by intrastate commerce constitutes regulation of interstate commerce which is barred by the Commerce Clause. The question to be determined was stated thus by this Court in *Union Brokerage Co.* v. *Jensen*, *supra*, at p. 209:

"Does the Minnesota legislation do that which the Commerce Clause was designed to prevent—does it express hostility toward those engaged in foreign commerce or practically obstruct its conduct?"

The fact that the State action takes the form of a tax impost does not alter this basic rule.

> "And there is a wide range of business and other activities which, though subject to federal regulation, are so intimately related to local welfare that, in the absence of Congressional action, they may be regulated or *taxed* by the states." (Italics supplied.)
>
> *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 (1944), at 548.

See also:

Best & Co., Inc., v. *Maxwell*, 311 U. S. 454, 455-456 (1940).

It is recognized that interstate commerce is required to pay a fair share of the cost of government of the localities where its business is carried on. *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335, 338 (1944); *McGoldrick* v. *Berwind-White Coal Mining Co.*, *supra*, at 46; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 178 (1939); *Western Live Stock* v. *Bureau of Revenue*, *supra*, at 254; *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937).

c. Whether a State tax constitutes a regulation of interstate commerce depends upon the facts in each case.

Whether a State tax consitutes a regulation of interstate commerce is a practical question to be determined upon the facts in each case. *United States* v. *South-Eastern Underwriters Assn.*, *supra*, at 548; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359 (1941), at 366; *Hump Hair Pin Co.* v. *Emmerson*, 258 U. S. 290, 295 (1922).

Thus, in *Nelson* v. *Sears, Roebuck & Co., supra,* this Court said (at p. 366):

> "Prohibited discriminatory burdens on interstate commerce are not to be determined by abstractions. Particular facts of specific cases determine whether a given tax prohibitively discriminates against interstate commerce."

Hence, to hold a State tax invalid under the Commerce Clause it must be established on the facts that, first, the tax affects interstate or foreign commerce; and, second, the tax constitutes a regulation of that commerce.

These, in summary, are the basic principles laid down by this Court by which the holding in the *Puget Sound* case and the holdings in the *Western Live Stock* and later cases must be tested to determine which is to be applied to the case at bar.

POINT II

The holdings of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases comply with the basic principles for determining the validity of State taxes under the Commerce Clause, whereas *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), does not. The *Western Live Stock* and later cases, therefore, should be regarded as determinative of the validity of the tax at bar.

a. The holdings of the *Western Live Stock* and subsequent cases.

In *Western Live Stock* v. *Bureau of Revenue, supra,* this Court upheld as valid under the Commerce Clause a State tax on gross receipts from an interstate business. Pointing out that some local taxes measured by gross receipts from interstate commerce have been declared un-

constitutional, the Court indicated the cause of their invalidity as follows (pp. 255-256):

> "The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (*citing cases*) or added to (*citing cases*) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

Thereafter, in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), which also presented the question of the validity of a tax on gross receipts from interstate commerce, this Court held that the applicable principles for decision were those of *Western Live Stock* v. *Bureau of Revenue, supra*, and the cases following it, saying (305 U. S. at 438):

> "The constitutional effect of a tax upon gross receipts derived from participation in interstate commerce and measured by the amount or extent of the commerce itself has been so recently and fully considered by this Court that it is unnecessary now to elaborate the applicable principles. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307; cf. *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604."

This Court then proceeded to summarize these principles thus (pp. 438-439):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens (*citation*), and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra*, 254 *et seq.*, and cases cited. But it is enough for present purposes that under the commerce clause, * * * state taxation, whatever its form, is precluded if it discrimi-

> nates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state (*citing cases*) burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

The same question was again considered by this Court and these principles reiterated and reaffirmed in subsequent cases, notably in *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford, supra*, and *McGoldrick* v. *Berwind-White Coal Mining Co*, 309 U. S. 33 (1940). In each of those cases the decisions prior to *Western Live Stock* involving State taxes generally on interstate commerce were re-examined and revalued, and the principles of the *Western Live Stock* and subsequent cases were promulgated on the basis of that re-examination and revaluation. In these cases the Court synthesized and placed into a logical pattern the maze of seemingly conflicting decisions made over the years in cases involving the validity of State and local gross receipts taxes under the Commerce Clause. These cases have, therefore, come to be regarded as landmarks in the field of State taxes under the Commerce Clause. See LOCKHART, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40 (1943); POWELL, *New Light on Gross Receipts Taxes*, 53 Harv. L. Rev. 909 (1940); LOCKHART, *State Tax Barriers to Interstate Trade*, 53 Harv. L. Rev. 1253 (1940).

The principles laid down in those cases, summarized in the above quotation from *Gwin, White & Prince, Inc.* v. *Henneford, supra*, have been uniformly applied as determinative by this Court in all cases subsequent to *Western Live Stock* in which the question of validity of State taxes—

whether on gross receipts or not—under the Commerce Clause was presented. Where, when tested by these principles, the facts indicated the State tax discriminated against interstate commerce, or was not upon or commensurate with local activity, or presented the possibility of multiple burdens upon interstate commerce, the tax was held invalid. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938); *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*; *Best & Co., Inc.* v. *Maxwell*, 311 U. S. 454 (1940); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944). Where, however, the application of these principles to the facts indicated no discrimination, no tax on extraterritorial activity but only upon local activity, and no possibility of multiple burdens, the tax was held valid. *Coverdale* v. *Pipeline Co.*, 303 U. S. 604 (1938); *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167 (1939); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940); *Dept. of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941); *Dept. of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941); *Allied Mills, Inc.* v. *Dept. of Treasury*, 318 U. S. 740 (1943), aff'd *per curiam* 220 Ind. 340 (1942); *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (1944); *General Trading Co.* v. *Tax Commission*, 322 U. S. 335 (1944).

The holdings of these cases conform to the basic principles for determining the validity of State taxes under the Commerce Clause as outlined in POINT I:

There is recognition that interstate business must pay its way locally and that the mere fact that interstate commerce is involved or affected by a State tax is not alone sufficient to invalidate. In each case, moreover, the facts were examined to determine whether the tax actually constituted a regulation of interstate commerce.

The States' fiscal requirements were accommodated to the interest of the Federal Government in preserving the free flow of interstate commerce. There were invalidated only taxes which in practical operation discriminated

against such commerce (*Best & Co., Inc.* v. *Maxwell, supra*), or were upon extra-state incidents or activity (*McLeod* v. *Dilworth Co., supra*), or subjected the commerce to possibility of multiple burdens (*Adams Mfg. Co.* v. *Storen, supra*, and *Gwin, White & Prince, Inc.* v. *Henneford, supra*). Moreover, in the two cases last cited the Court's realization of the need for reconciling State and federal interests is manifested by its recognition of the theory of allocation or apportionment as applicable to gross receipts taxes, as a means available to States of obtaining tax revenue from interstate commerce while avoiding the possibility of multiple burdens on that commerce.

Where, on the facts, the tax was found not susceptible of regulatory effect the tax was sustained (see cases cited p. 18, *ante*).

b. The holding in the *Puget Sound* case.

Puget Sound Co. v. *Tax Commission*, 302 U. S. 90 (1937), held invalid under the Commerce Clause a State gross receipts tax upon wholly local stevedoring activities. The holding of that case was, in effect, that persons engaged in a wholly local business in or connected with interstate commerce may not be subjected to a State tax on the gross receipts from that business. Thus (302 U. S., at 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. * * * The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states."

In reaching this conclusion there was considered only one of the two questions required to be determined to hold a State tax invalid under the Commerce Clause. As we have seen, the two questions are: (1) Is interstate or foreign commerce involved? (2) Does the tax have the

effect of regulating that commerce? In the *Puget Sound* case, only the first question was gone into, the Court holding that stevedoring activities were in interstate commerce. The second question, however, does not appear to have been taken up. The case is disposed of by the flat statement that a State cannot tax gross receipts from interstate commerce.

Thus, the New York State courts had to decide in this case whether the *Puget Sound* case or the later ones relied upon by petitioners were to be regarded as controlling the case at bar. The New York State courts regarded the *Puget Sound* case as the controlling authority. The Appellate Division in its opinion expressly said so (R. 77). While the Court of Appeals rendered no opinion, the inference is inescapable that it was of the same view.

However, in two earlier cases the Court of Appeals had actually upheld the validity under the Commerce Clause of local taxes on interstate commerce. *O'Kane* v. *State of New York*, 283 N. Y. 439 (1940); *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942). The latter case involved the same New York City general business tax law as is here involved.

In deciding these cases the Court of Appeals necessarily adopted and applied the principles of law expressed in the *Western Live Stock, Adams Mfg. Co., Gwin, White & Prince* and *Berwind-White* cases. The failure of the Court of Appeals to do so in the case at bar can only be ascribed to the fact that, confronted with the *Puget Sound* case, with facts seemingly identical with those of the case at bar, the State court was reluctant to disregard that holding on a federal constitutional question in the absence of an express overruling of that case by this Court. This reluctance is understandable. However, if the *Western Live Stock* and later cases are valid and grounded upon the basic principles of law applicable and the *Puget Sound* case is not, the former must be applied to the case at bar and the *Puget Sound* holding upon which the New York courts relied must be rejected.

c. The *Puget Sound* holding is not in accord with the basic principles and has, in effect, been rejected and overruled, particularly in *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939).

We have seen that the *Western Live Stock* and later cases do comply with the basic principles applicable to the case at bar (pp. 18-19, *ante*). However, the *Puget Sound* case fails utterly to meet the test of those basic principles. No attempt was made in the *Puget Sound* case to determine the practical effect of the tax. While the fact that the *Puget Sound* case involved local stevedoring activities may explain why the New York State courts considered that case controlling in the case at bar, that fact simply established that the tax as imposed *affected* interstate commerce. However, it had no bearing upon the question whether the tax had the effect of *regulating* interstate commerce. That is a question of fact depending upon the nature and practical effect of the tax—whether it actually discriminated against interstate commerce or created the possibility of undue or multiple burden. Certainly it could not have been regarded as being upon extra-state activity or not commensurate with local activity since the taxpayer there conducted business only within the taxing State (302 U. S. at 91). That case was determined not on the facts, but by application of an abstract rule that gross receipts from interstate commerce are immune from State taxation.

No attempt was made to harmonize or accommodate the State and Federal interests in the matter. No thought was given to the requirement that interstate business must pay its way locally.

It is clear, therefore, that the *Puget Sound* holding fails to conform to the basic general principles governing the determination of the validity of a State tax under the Commerce Clause. Furthermore, it is contrary to the law governing the validity of State gross receipts taxes under the Commerce Clause as uniformly and consistently laid

down and applied by this Court in all later cases from *Western Live Stock* v. *Bureau of Revenue* up to date. This alone is in effect an overruling of the *Puget Sound* case.

Its questionable status as authority is further indicated by the fact that it has never been cited as controlling by this Court in any subsequent case in which the same question was involved, *i.e.*, the validity of a State gross receipts tax on wholly local activity in interstate commerce.

Moreover, the decision of this Court in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* is in effect a rejection and overruling of the *Puget Sound* case. This is clear from the following facts:

1. Both cases involved the same State gross receipts tax (Washington Laws, 1935, ch. 180).

2. In both cases it was determined that the tax was upon interstate commerce. Thus:

> "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce."
>
> *Puget Sound* case, *supra,* at p. 92.

> "For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that [interstate or foreign] commerce. Such services are within the protection of the commerce clause * * *."
>
> *Gwin, White & Prince* case, *supra,* at p. 437.

3. In the *Puget Sound* case the result of invalidity was predicated solely upon the fact that interstate commerce was involved—without more. No inquiry was made to determine whether the tax in fact burdened or regulated interstate commerce in any way. Thus (302 U. S. at 94):

> "The business of loading and unloading being interstate or foreign commerce, the State of Washington is not at

liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. • • • The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states."

4. If this were the applicable law it was sufficient to dispose of the *Gwin, White & Prince* case. Justices BUTLER and MCREYNOLDS in their concurring opinion in that case took the view that it was and relied upon and cited the *Puget Sound* case. Yet the majority opinion in the *Gwin, White & Prince* case did not even mention the *Puget Sound* case.

5. The conclusion of the majority of the Court in the *Gwin, White & Prince* case that the tax was invalid was not predicated, as was the decision in the *Puget Sound* case, on the single fact that interstate commerce was involved. The majority's conclusion was based rather upon an examination of the facts in the case which indicated that the tax as there imposed had the effect of regulating the commerce. The following are the facts leading the Court to this conclusion:

"While appellant is engaged in business within the state, • • • the interstate commerce service which it renders and for which the taxed compensation is paid *is not wholly performed within the state. A substantial part of it is outside the state* • • •." (Italics supplied.)

Gwin, White & Prince, Inc. v. *Henneford, supra,* at p. 438.

"Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, *is not apportioned to its activities within the state.* If Washington is free to exact such a tax, *other states to which the commerce extends may, with equal right, lay a tax similarly measured* • • •. *The present tax* • • • *thus in its practical operation discriminates*

> *against interstate commerce,* since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed." (Italics supplied.)
>
> *Ibid,* at p. 439.

This, it is submitted, is as direct a rejection and overruling of the *Puget Sound* holding as is possible, short of express statement.

Manifestly, therefore, the case at bar is controlled by the cases upon which petitioners rely. Applying the principles of those cases to the tax here involved, it is unquestionably valid.

POINT III

The tax at bar is valid under the Commerce Clause. It is non-discriminatory, commensurate with and reflective only of purely local activity, and is not susceptible of being duplicated in any other jurisdiction.

The principles for determining the validity of State gross receipts taxes under the Commerce Clause as they appear from the *Western Live Stock* and subsequent cases referred to may be summarized as follows: (1) persons doing business in, or connected with interstate or foreign commerce, are not immune from all taxes on their gross receipts; (2) such taxes are invalid under the Commerce Clause only if they discriminate against interstate commerce or result in the possibility of cumulative multiple tax burdens merely because interstate business is being done; (3) the possibility of cumulative multiple tax burdens is avoided as to such taxes by basing the tax either on the receipts from the particular activity locally carried on or, if the activity extends beyond State lines, upon a portion of the over-all gross receipts determined by formula to be commensurate with the activity locally carried on.

The application of these principles to the facts of the case at bar proves the tax to be valid under the Commerce Clause.

Petitioners are not here questioning that the respondent's business of stevedoring is part of interstate commerce and subject to federal regulation. However, petitioners do deny that the tax here involved is in any sense a regulation of interstate or foreign commerce or in any way interferes with or infringes upon the authority of Congress to regulate that commerce. The tax is not discriminatory; it is properly commensurate with the activity carried on locally, and there is no possibility of cumulative multiple tax burdens.

a. The tax is non-discriminatory.

The tax is a general business tax. It applies without discrimination to all persons carrying on business within the City. The same rate of tax is imposed upon all persons and the same tax base—gross receipts—is used for all persons. The tax does not apply only to persons engaged in interstate and foreign commerce, nor does it apply to such persons at a higher rate or in any respect more onerously than to persons engaged in purely local business. The lack of discriminatory intent and the scrupulous regard for the right of persons engaged in interstate and foreign commerce is manifested by the special provision requiring that where taxation of a receipt in its entirety is barred by the Constitution, a proper apportionment shall be made. There can be no question, therefore, that there is no discrimination either as against persons engaged in foreign and interstate commerce generally or against this respondent in particular.

b. The tax is commensurate with the respondent's local activity.

The receipts in question arise out of the respondent's wholly local business activity. No part thereof is earned

or contributed to by any activity outside the City. Hence, no allocation or apportionment is required to avoid the possibility of undue burden or multiple taxation, for it is clear that these receipts properly reflect the activity, and only the activity, carried on within the City of New York. A tax, therefore, based upon these receipts is obviously commensurate with the respondent's activity within the City of New York and cannot in any way be ascribed to, or regarded as being reflective of, any extra-city activity. The fact that this activity is in interstate commerce or that the receipts arise out of participation in interstate commerce does not, as we have seen, bar the tax, for "even interstate business must pay its way". *Western Live Stock* v. *Bureau of Revenue, supra*, p. 254; *Gwin, White & Prince, Inc.* v. *Henneford, supra*, p. 438.

c. The tax raises no possibility of an undue or multiple burden on interstate commerce.

The tax here involved does not impose any affirmative impediment to the conduct of interstate business. The carrying on of such business is not conditioned upon the payment of the tax. No licensing requirement is imposed by the law. Failure to pay the tax does not bar a person from carrying on his business or from engaging in business activity within the City.

In the case at bar there is no possibility of cumulative or multiple taxation. The respondent is engaged in business only in the City of New York. It has no place of business elsewhere. It has no property elsewhere. The services from which the receipts subjected to tax arise are performed wholly within the territorial limits of the City. It is, therefore, impossible for the tax here involved to be a burden "of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it

would bear cumulative burdens not imposed on local commerce." *Western Live Stock* v. *Bureau of Revenue, supra*, pp. 255-256.

On these facts it is clear that this tax does not constitute a regulation of interstate or foreign commerce, nor does it intrude upon the federal power to regulate that commerce. Therefore it does not offend the Commerce Clause and must be sustained.

POINT IV

The invalidation of this tax will result in discrimination against intrastate commerce and will impede the carrying out of the State and City fiscal program.

(1)

The exclusion of interstate business from bearing a share of the local tax burden on a par with intrastate business has the effect of discriminating against and adding to the burdens borne by local business not in interstate commerce. The Commerce Clause affords no basis for such a result. Such exemption of interstate business is required only if necessary to effectuate the purpose of the Commerce Clause to safeguard interstate commerce from burdens not borne by intrastate commerce.

> "We only hold that where a State seeks to tax gross receipts from interstate transactions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. • • • To deny Indiana this power would be to make local industry suffer a competitive disadvantage."
>
> *International Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340 (1944) at 349.

The *Western Live Stock* formula makes it possible for a State to place a fair share of the local tax burden upon persons engaged in interstate commerce within its borders without interfering with or regulating that commerce. Interstate business within a given State or community enjoys the police protection, fire protection, sanitation service, road maintenance and every other type of service afforded by the local governments equally with intrastate business. The City of New York also affords services which are of special and more immediate benefit to persons such as this respondent. As an example, the City maintains special marine fire and police fleets for protection of business on the City waterfronts.* There is no reason why in devising local tax programs the States and communities should not be able to count upon tax contributions from all persons within the community who share those benefits and services, including those engaged in interstate commerce.

(2)

This general business tax, as has been pointed out, is part of a program designed to relieve the heavy tax burden of real estate owners of the City. A tax upon property within the City, even if owned by persons in interstate commerce, would, of course, be valid. Can it be said that because of the Commerce Clause, the City of

* Seventy-fifth Annual Report, Fire Department of the City of New York (1940), pp. 19, 38, 101; Rules and Regulations, Police Department of the City of New York, pp. 24-25. For eighteen days in October, 1945, the police and protective services of the City, its labor conciliation service, the municipal radio broadcasting facilities, among others, were used extensively in an effort to settle a longshoremen's strike in the City and to safeguard the interests of the stevedores in the City, police protection to the City generally being seriously impaired by the assignment of extra police to this strike duty. The New York Times, Oct. 3, 1945, p. 15, col. 2; Oct. 6, 1945, p. 3, col. 2; Oct. 12, 1945, p. 1, col. 1; Oct. 13, 1945, p. 1, col. 8; Oct. 15, 1945, p. 1, col. 8; Oct. 16, 1945, p. 1, col. 8; Oct. 17, 1945, p. 1, col. 8; Oct. 18, 1945, p. 1, col. 8.

New York is barred from revising its tax scheme so as to shift part of the tax burden from real property which reaches only a limited number of persons, to a gross receipts tax base which obviously makes it possible to spread the burden more widely? Certainly, where the tax is imposed, as in the instant case, without discrimination against interstate commerce in form or in substance, and where the tax reflects and is commensurate only with purely local activity, there can be no question that the Commerce Clause is not offended.

Since the States and localities are entitled to contributions from all persons within their jurisdictions toward the support of the cost of the State and local governments, it should make no difference whether the form used for obtaining this contribution is a property tax or a gross receipts tax or any other form of tax, so long as interstate commerce is not discriminated against or unduly burdened.

Had the City of New York chosen, and been able to increase its real estate taxes, the gross receipts tax might possibly have been obviated. If this respondent were a real property owner its tax burden and accordingly its cost of doing business would then have been increased. Such an increase could not be regarded as a forbidden burden because the respondent was engaged in interstate commerce. There is no reason why the burden of a gross receipts tax conforming to the *Western Live Stock* formula, as does the one at bar, should be regarded differently.

CONCLUSION

We believe that we have demonstrated that the tax here involved does not in any respect constitute a regulation of interstate or foreign commerce. It is non-discriminatory, applying equally to intrastate as well as interstate commerce. It is reflective of local activity only and cannot possibly be duplicated in form or substance in any other jurisdiction. The tax is therefore valid. We believe we have demonstrated further that the holding in the *Puget Sound* case is contrary to the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause. The New York State courts, therefore, erred in considering that case controlling.

The final order and judgment should be reversed and the petitioner-Comptroller's determination reinstated.

New York, N. Y., January 23, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel of the City of New York,
Counsel for Petitioners.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 24 1916
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1915

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

No. 518 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

No. 519 30

APPENDIX OF STATUTES.

JOHN J. BENNETT,
Corporation Counsel of the City of New York,
Counsel for Petitioners,
Municipal Building,
New York, N. Y.

INDEX

PAGE

Appendix A. Provisions of New York City Local Law No. 78 of 1940 1

Appendix B. Provisions of State Enabling Act, Laws of New York 1940, Chapter 245 (Enabling Act for Local Law No. 78 of 1940) 18

Appendix C. Provisions of Article 2-B of General City Law, Laws of New York 1941, Chapter 199 (Enabling Act for Local Law No. 47 of 1941) 24

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1940.

No. 78

A LOCAL LAW to amend the administrative code of the city of New York, in relation to raising revenue for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by re-enacting and imposing a tax upon the privilege of carrying on or exercising, for gain or profit, within the city of New York, any trade, business, profession, vocation, commercial activity or financial business, or of making sales to persons within such city, and extending the time during which such tax shall be imposed.

Became a law June 29, 1940, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the Council as follows:

Section 1. Title R of chapter forty-one of the administrative code of the city of New York, as added by local law number one hundred three for the year nineteen hundred thirty-nine, is hereby amended to read as follows:

Appendix A

TITLE R

General Business and Financial Tax

§R41-1.0. **Definitions.** When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deductions therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

Appendix A

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Appendix A

Receipts of a non-profit membership corporation for the purpose of holding a world's fair and confining its operations solely to preparing for and conducting such fair.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer." The treasurer of the city.

§R41-2.0. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, or as provided in subdivision c hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section R41-1.0 of this title, for gain or profit within the city for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and

nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which such period shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this provision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of the calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year from the date when he became so engaged; and if such person shall not have been so engaged for an entire year prior to June

thirtieth of the year in which the tax imposed by this title becomes due and payable, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred thirty-nine, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§R41-3.0. **Presumption and burden of proof.** For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§R41-4.0. **Filing of returns.** Every person subject to tax under this title shall on or before the fifteenth day of June of the years in which the one-year periods referred to in subdivision a of section R41-2.0 of this title shall end, file a return under oath with the treasurer, except that any person required to file a return for a period beyond the first day of May of any such year may file such return on or before the first day of August thereof. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or treasurer or their duly author-

ized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this title pertaining to his receipts. Whenever the treasurer shall require supplemental returns, he shall promptly notify the comptroller thereof.

§R41-5.0, **Payment of tax.** At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§R41-6.0. **Determination of tax.** If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller and treasurer they shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and/or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller and treasurer shall of their own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such

determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§R41-7.0. **Refunds.** In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the compfroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section R41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section R41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as pro-

vided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§R41-8.0. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section R41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§R41-9.0. **Remedies exclusive.** The remedies provided by sections R41-6.0 and R41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or pro-

ceeding other than proceedings under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section R41-6.0 of this title.

§R41-10.0. **Proceedings to recover tax.** a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provision of this title or of articles eight to twelve inclusive of title E of chapter forty-one of the code is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the sheriff of any county within the city, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the

tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§R41-110. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller or other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and, in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§R41-12.0. **General powers of the treasurer.** In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§1341-13.0. **Administration of oaths and compelling testimony.** a. The comptroller or treasurer or his employee duly designated and authorized by them shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, and punishment

for which shall be of a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the sheriffs of the counties within the city, and their duly appointed deputies.

§R41-14.0, **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of the tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section R41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or

imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the comptroller or treasurer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§R41-15.0. **Notices and limitations of time.** a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the

amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§R41-16.0. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

Appendix A

§R41-17.0. **Separability.** If any provision of this title, or the application thereof to any person or circumstances is held invalid, the remainder of this title, and the application of such provisions to other persons or circumstances shall not be affected thereby.

§R41-18.0. **Construction and enforcement.** This title shall be construed and enforced in conformity with chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four as amended, pursuant to which it is enacted.

§2. This local law shall take effect July first, nineteen hundred forty.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1940

CHAPTER 245

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," in relation to authorizing specified types of taxes for relief and welfare and providing for the review thereof

Became a law March 30, 1940, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to im-

pose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," as last amended by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, are hereby amended to read as follows:

Section 1. Notwithstanding any other provisions of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred forty-one to adopt and amend local laws imposing in any such city any or all of the following types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, such taxes to be collected and administered by the fiscal officers of such city in the same manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city: (a) Taxes on the use, sale, exchange, transfer, storage, withdrawal, retention, installation or license to use or consume tangible personal property, other than, on or after July first, nineteen hundred forty, cigarettes.

(b) Taxes on the privilege of doing any business, engaging in any trade, calling, occupation or profession; owning, holding or occupying any property; possessing or exercising any franchise or franchises; or on the gross receipts from sales to persons within such city.

(c) Taxes on the sale or performance of services including utility services but excluding professional services.

The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen

hundred forty-one, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons, or upon the gross income from the operation of hotels, multiple dwellings or office buildings by persons in the business of operating or leasing sleeping or parlor railroad cars or of operating railroads other than street surface, rapid transit, subways and elevated railroads, or upon gross incomes or gross operating incomes of persons subject to taxation under the provisions of section one hundred eighty-six-a of the tax law, except in accordance with the provisions of section twenty-b of the general city law; or upon interest or dividends received from a corporation by a person referred to in this paragraph.

This act shall not authorize the imposition of a tax on any transaction, originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

Except as expressly otherwise in this act provided, nothing herein contained shall limit or prevent the imposition

of a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such city.

No such person, firm or corporation, however, shall be subject to the imposition of more than one tax by any such city on gross income or gross receipts for the privilege of doing business under the provisions of this act.

A person who has a permanent place of abode without such city and lives more than seven months of the year out of such city shall be deemed a non-resident within the meaning of this act.

Any final determination of the amount of any tax payable hereunder shall be reviewable for error, illegality or unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the civil practice act if application therefor is made to the supreme court within thirty days after the giving of the notice of such final determination, provided, however, that any such proceeding under article seventy-eight of the civil practice act shall not be instituted unless the amount of any tax sought to be reviewed, with such interest and penalties thereon as may be provided for by local law or regulation, shall be first deposited and an undertaking filed, in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Where any tax imposed hereunder shall have been erroneously, illegally or unconstitutionally collected an application for the refund thereof duly made to the proper fiscal officer or officers, and such officer or officers shall have made a determination denying such refund, such determination shall be reviewable by a proceeding under article seventy-eight of the civil practice act, provided, however, that such

proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made with respect to taxes imposed under local laws enacted prior to July first, nineteen hundred thirty-eight, after July first, nineteen hundred forty-one, and with respect to taxes imposed under local laws enacted subsequent to July first, nineteen hundred thirty-eight, after the expiration of more than three years from the date of the filing of a return, provided however, that where no return has been filed as provided by law the tax may be assessed at any time.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred thirty-three; for defraying the cost of collecting and administering such taxes, but not in excess of such cost, during the year immediately preceding; and for the relief purposes for which such taxes have been imposed under the provisions of this act.

Notwithstanding the foregoing limitations, a sum not to exceed four million five hundred thousand dollars may be expended for old age assistance by any such city from the taxes imposed and collected hereunder prior to the first day of July, nineteen hundred forty.

Such legislative body may authorize the performance of public work for the relief purposes aforesaid to be paid for out of the tax or taxes imposed under this act and which may be undertaken other than by contract by such municipal corporation, during the period aforesaid, through and under its welfare or other department.

The provisions of this act shall be effective notwithstanding any provisions contained in any charter, or in any general, special or local laws to the contrary, and notwithstanding any such provisions therein contained requiring such work as may be undertaken to be let by contract.

§ 2. This act shall take effect immediately.

APPENDIX C

Provisions of Article 2-B of General City Law (Enabling Act for Local Law No. 47 of 1941)

LAWS OF NEW YORK

1941

Chapter 199

AN ACT to amend the general city law, to enable certain cities to impose and collect taxes on certain businesses

Became a law March 28, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-six of the laws of nineteen hundred nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," is hereby amended by adding thereto a new article, to be article two-B, to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses.

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§24-a. **Certain cities authorized to impose taxes on certain businesses.** Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, until July first, nineteen hundred forty-four, shall have

power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-twentieth of one percentum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed one-tenth of one per centum of such gross income. In any such city in which the functions of the chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

(NOTE:—*Here follows the prescribed model law which is practically verbatim the provisions of the local law [Title R of the Administrative Code of the City of New York] set forth in Appendix A, at pages 2 to 17,* supra.)

§24-b. **Authority to impose other taxes; limitations.** Nothing in this article contained shall limit the power of any city to adopt or amend local laws imposing the tax authorized by section twenty-b of this chapter, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Nothing in this article contained shall be construed to refer to or authorize a tax such as is authorized to be imposed by subdivision b of section one of chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as last amended, upon (a) the gross income of persons subject to the supervision of either division of the department of public service; (b) the gross income of persons engaged in the business of operating or leasing sleeping

and parlor railroad cars or operating railroads other than street surface, rapid transit, subway and elevated railroads; (c) the gross operating income of persons engaged in the business of operating omnibuses with a carrying capacity of more than seven persons who are not subject to the supervision of either division of the department of public service; (d) the gross income of persons constructing, owning, operating, managing or leasing electrical subways, conduits, ducts, subsidiary connections or similar structures and equipment upon, above, or under any public or private street, public or private avenue, highway, public or private place, road or ground in any such city, through which are run electrical conductors, either low or high tension, by itself, or by any person engaged in the business of affording telephonic or telegraphic communication for hire or in the business of manufacturing, generating, distributing or transmitting electricity; or (e) the gross operating income of persons not subject to the supervision of either division of the department of public service but furnishing or selling gas, electricity, steam, water, refrigeration, telephony or telegraphy, or furnishing or selling gas, electric, steam, water, refrigeration, telephone or telegraph service, or operating omnibuses (whether or not such operation is on the public streets), regardless of whether such furnishing or selling or operation constitutes the main activity of such person or is merely incidental thereto.

§24-c. **Revenues; disposition of.** Revenues resulting from the imposition of taxes authorized by this article two-b shall be paid into the treasury of the city imposing the same and may be credited to or deposited in the general fund of such city.

§2. Article two-b of such chapter, as added by chapter five hundred and two of the laws of nineteen hundred twenty-one, as amended by chapter six hundred and four of the laws of nineteen hundred twenty-three is hereby renumbered to be article two-c.

§3. This act shall take effect immediately.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 1 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

No. 518. 23

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

No. 519. 30

On Writ of Certiorari to the Supreme Court of the State of New York

REPLY BRIEF FOR PETITIONERS

February 28, 1946.

JOHN J. BENNETT,
Corporation Counsel of the City of New York,
Counsel for Petitioners.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.

INDEX

PAGE

POINT I—The principles of the *Western Live Stock* and later cases are applicable to cases involving interstate transportation of goods. The same constitutional principles apply in determining the validity of State taxes under the Commerce Clause to all cases involving interstate commerce, whether the commerce consists of interstate sales of goods or their transportation interstate 2

POINT II—There is no possibility of a duplication of the tax here involved, in form or in substance, upon these respondents, their receipts or their activities in any other jurisdiction 5

POINT III—The imposition of the tax at bar does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States 8

POINT IV—The tax at bar does not interfere with the power of Congress over navigation 9

POINT V—The tax at bar does not violate Article 1, Section 10, Clause 2 of the Constitution of the United States, which prohibits State "imposts or duties on imports or exports" 10

CONCLUSION 12

Table of Cases Cited

	PAGE
Adair v. United States, 208 U. S. 161 (1908)	3
Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938)	5, 12
American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919)	4
Carmichael v. Southern Coal Co., 301 U. S. 495 (1937)	9
Coverdale v. Pipe Line Co., 303 U. S. 604 (1938)	7
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917)	11, 12
Currin v. Wallace, 306 U. S. 1 (1939)	3
Ficklen v. Shelby County Taxing District, 145 U. S. 1 (1892)	4
Gibbons v. Ogden, 9 Wheat. 1 (1824)	3
Gilman v. Philadelphia, 3 Wall. 713 (1866)	9
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939)	5, 12
Hopkins v. United States, 171 U. S. 578 (1898)	3
Liggett Co. v. Lee, 288 U. S. 517 (1933)	9
Maine v. Grand Trunk Ry., 142 U. S. 217 (1891)	4
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940)	5, 6
New York Rapid Transit Co. v. City of New York, 303 U. S. 573 (1938)	8, 9
Puget Sound Co. v. Seattle, 291 U. S. 619 (1934)	9
Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937)	2

PAGE

Standard Dredging Co. v. Murphy, 319 U. S. 306 (1943) 9, 10

United States v. South-Eastern Underwriters Assn., 322 U. S. 533 (1944) 3

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 2, 4, 5, 12

Wisconsin & Michigan Ry. v. Powers, 191 U. S. 379 (1903) 4

Statutes Cited

New York Tax Law:

Sec. 4, subd. 11 8

United States Constitution:

Art. 1, Sec. 8, cl. 3 (Commerce Clause) 10

Art. 1, Sec. 10, cl. 2 (Export-Import Clause) 10

Art. 3, Sec. 2, cl. 1 ..... 9, 10

Fourteenth Amendment (Equal Protection Clause) 8

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners,* *against* CARTER & WEEKES STEVEDORING COMPANY, *Respondent.*	No. 518
JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners,* *against* JOHN T. CLARK & SON, *Respondent.*	No. 519

On Writ of Certiorari to the Supreme Court of the State of New York

REPLY BRIEF FOR PETITIONERS

The brief submitted on behalf of John T. Clark & Son, respondent in No. 519, sets forth the argument of respondents in both of these cases. The brief of Carter & Weekes Stevedoring Company, respondent in No. 518, consists merely of a statement adopting as its own the arguments set forth in the brief of respondent Clark, except for POINT I of that brief. For convenience, therefore, this brief is filed under a single cover in reply to both respondents.

The issues presented in both cases are concededly identical. As to POINT I in respondent Clark's brief, pertaining to the taxability of its receipts from its stevedoring operations in New Jersey, petitioners state again, as they did

in their main brief in that case (p. 3), that they do not here, as they did not in the New York State courts, press the issue of the taxability of those receipts, and do not here seek to sustain the tax as to those receipts.

POINT I

The principles of the *Western Live Stock* and later cases are applicable to cases involving interstate transportation of goods. The same constitutional principles apply in determining the validity of State taxes under the Commerce Clause to all cases involving interstate commerce, whether the commerce consists of interstate sales of goods or their transportation interstate.

In their briefs, respondents raise no issue concerning the fact that their stevedoring activities, the receipts from which are sought to be taxed, are wholly within the City of New York. Nor do they question the fact that the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), is inconsistent and irreconcilable with the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and the later cases upon which petitioners rely.

However, respondents seek to avoid the effect of the *Western Live Stock* and later holdings by asserting that since those cases involved taxes on gross receipts from interstate sales of goods, they are not applicable to and do not affect cases involving taxes on gross receipts from interstate transportation, in which category respondents place the *Puget Sound* and the instant cases (Resp. Br., pp. 20-24). They assert, moreover, that the tax here involved is susceptible of duplication in other jurisdictions (Resp. Br., pp. 24-29).

There is no merit to either contention.

(1)

The Commerce Clause authorizes Congress to regulate "commerce" with foreign nations and among the several States. This includes any commercial activity which can be regarded as interstate or foreign in nature and affords no basis for distinctions between different types of activity. As this Court said in *Adair* v. *United States*, 208 U. S. 161 (1908), at pp. 176-177:

> "Let us inquire what is commerce, the power to regulate which is given to Congress?
>
> This question has been frequently propounded in this court, and the answer has been—and no more specific answer could well have been given—that commerce among the several States comprehends traffic, intercourse, trade, navigation, communication, the transit of persons and the transmission of messages by telegraph—indeed, every species of commercial intercourse among the several States, but not to that commerce 'completely internal, which is carried on between man and man, in a State, or between different parts of the same State, and which does not extend to or affect other States'. The power to regulate interstate commerce is the power to prescribe rules by which such commerce must be governed."

See, also: *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533, 550-551 (1944); *Hopkins* v. *United States*, 171 U. S. 578, 597 (1898); *Gibbons* v. *Ogden*, 9 Wheat. 1, 189-191, 194 (1824).

This Court has in fact held that it includes transportation as well as sales or other forms of commercial intercourse.

> "Where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation."
>
> *Currin* v. *Wallace*, 306 U. S. 1 (1939), at p. 10.

Hence, regardless of whether the interstate commerce consists of transportation or sale of goods, the same question must be considered in determining the validity of a State tax under the Commerce Clause—does it regulate the commerce? If on the facts the tax does regulate the commerce—i.e., interferes with, discriminates against or unduly burdens the transportation or the sale—it is invalid regardless of whether the commerce consists of transportation or sale. If, on the other hand, the facts indicate the State tax does not regulate the commerce, it is valid, also regardless of whether the commerce be interstate transportation of goods or interstate sale of goods.

(2)

Assuming for present purposes the validity of respondent's claim that they are engaged in interstate transportation, the *Western Live Stock* case itself demonstrates the utter lack of substance in respondents' contention that that case is not applicable here because it involved interstate sales and not interstate transportation.

In the *Western Live Stock* case, this Court examined its prior decisions on the validity of State taxes under the Commerce Clause and synthesized them into a pattern from which the principles therein expressed clearly emerged. In analyzing its prior decisions and developing those principles, this Court made no distinction whatever between interstate sales and interstate transportation cases. Cases of both kinds were cited interchangeably as illustrative of certain principles. Thus, for example, in support of the principle that no undue multiple burden exists where the tax is fairly apportioned to the commerce carried on within the taxing State, the Court cited many transportation cases, including *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217 (1891), and *Wisconsin & Michigan Ry.* v. *Powers*, 191 U. S. 379 (1903), as well as *Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1 (1892), and *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), both of which involved interstate trade rather than transportation.

Indeed, most of the cases cited by the Court in the *Western Live Stock* case to support and illustrate the cumulative-burden concept were cases involving taxes measured by gross receipts derived from interstate transportation (see *Western Live Stock* v. *Bureau of Revenue, supra,* at pp. 256-257).

This Court has similarly cited interchangeably both interstate sales and interstate transportation cases in the other decisions upon which petitioners rely. See, *e.g., McGoldrick* v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940); *Gwin, White & Prince, Inc.* v. *Henneford,* 305 U. S. 434 (1939); *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307 (1938).

Therefore, no basis exists for the distinction sought to be drawn by respondents. The doctrines of the *Western Live Stock* case apply with equal vigor to any case involving State taxation of interstate commerce irrespective of the form it takes, because: (1) in so far as constitutional principles are concerned, this Court has made no distinction between a tax on gross receipts from interstate transportation of goods, and one on gross receipts from interstate sales of goods; and (2) in deciding the *Western Live Stock* and subsequent cases this Court considered and cited as applicable both types of cases without distinction.

POINT II

There is no possibility of a duplication of the tax here involved, in form or in substance, upon these respondents, their receipts or their activities in any other jurisdiction.

(1)

Respondents, admitting that the tax is non-discriminatory (Resp. Br., p. 27) and that their activities here involved take place wholly within the taxing jurisdiction of New York City (Resp. Br., p. 2), assert nevertheless

that a possibility of multiple taxation exists here because the cost of stevedoring services is an element in the ultimate cost of the goods shipped, the sale of which may at some future time be subjected to another tax. Respondents refer to the *dissenting* opinion in *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* as showing that such a possible sales tax upon such an eventual sale will be a duplication of tax (Resp. Br., p. 26).

This is an assertion, in effect, that there is duplication of tax because the tax may be passed on. There is, however, no proof in the record that the tax here involved was or will be, or can be (considering the effect of other relevant factors such as competition, for example), passed on. Even if it were to be passed on, it would be an economic burden, not a legal or tax burden. It would be an additional cost of doing business just as would any other expense or any other tax paid. Such an economic effect does not constitute a barrier to the tax under the Commerce Clause, for as this Court said in the *Berwind-White* case, *supra,* at page 46:

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business."

(2)

Respondents also assert that since their receipts are based upon a rate per ton of freight, the tax here involved is in effect a toll upon every ton of freight in interstate or foreign commerce, and "if New York City can levy such a tax * * * so can every other state and municipality along the line of the interstate journey" (Resp. Br., p. 26).

No syllogistic reasoning of this kind can transform the tax here involved into a tax upon transportation or upon freight. This is a general tax upon all persons doing business within the City. It is not aimed at or based upon freight, any more than it is directed at the shoes or signs or trucks or any other article manufactured or dealt with

by any person doing business in the City. It would apply to respondents' receipts regardless of the basis upon which respondents charge their customers—whether the charge be per ton of freight, or per man employed, or per day or hour, or per cubic foot or square foot of ship hold filled or cleared, or upon any other basis.

The situation of these respondents is similar to that of the taxpayer in *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604 (1938). The tax there was upon the generation of energy used to pump natural gas through pipe lines in interstate commerce—not upon the gas itself, the subject of the commerce. In the cases at bar the tax is upon stevedoring activities which assist the movement of goods in interstate commerce—not on the goods. What was said by this Court in the *Coverdale* case with respect to possible duplication of tax in other jurisdictions, is just as applicable here, and disposes of respondents' contentions. Thus, *Coverdale* v. *Pipe Line Co., supra,* at pages 612-613:

> "It is true that each state through which a pipe line passes could lay a tax on the use of engines for the production of power, but that would not be multiple taxation 'merely because interstate commerce is being done', as discussed in *Western Live Stock* v. *Bureau of Revenue*, ante, p. 255, and the authorities there cited. It would not be a tax on the same activity, either in form or in substance. Like a property tax on the pipes or equipment in different states, it would be a different tax, on a different and wholly separate subject matter, with no cumulative effect caused by the interstate character of the business. It would not be multiple taxation for each state to tax the 'booster station' *ad valorem* as property. Neither is it prohibited multiple taxation to have the possibility of other privilege taxes on the production of power. *It is length of line, not interstate commerce, which makes another tax possible.*" (Italics supplied.)

The loading and unloading activities of these respondents are, to be sure, connected with activities carried on by other persons in other jurisdictions. However, it is

clear that any taxes which other jurisdictions might impose could not fall on these respondents, nor upon the activity or receipts which are the subject of the tax here involved. The taxes of other jurisdictions, if any, could only be on a portion or fraction of the over-all haulage, exclusive of the activity sought to be taxed here.

The fact that the respondents may be subject to other taxes imposed by the State of New York or by the City of New York (see Resp. Br., p. 25) does not, of course, render the present tax a "double burden" or affect its validity under the Commerce Clause. Certainly these other taxes do not result because respondents engage in interstate commerce, nor do they impose additional burdens upon respondents because they engage in an activity in interstate commerce.

Nor does the fact that the revenues from the tax are used for unemployment relief affect the question here involved (see Resp. Br., p. 25). Relief of unemployment is as much a proper governmental purpose as is highway maintenance or police protection. *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938), at 584 *et seq.*, and cases cited.

POINT III.

The imposition of the tax at bar does not violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Even if we assume that corporations engaged in foreign ocean commerce can be regarded as exempt from a tax on their gross receipts under the provisions of New York Tax Law, § 4, subd. 11 (referred to and quoted in respondents' brief, p. 30), which exempts such corporations from tax on "their capital stock, franchises and earnings", the tax at bar does not violate the Equal Protection Clause of the Fourteenth Amendment, since corporations engaged

in foreign ocean commerce may for tax purposes properly be treated differently from stevedores. *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938); *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495 (1937); *Puget Sound Co.* v. *Seattle*, 291 U. S. 619 (1934); *Liggett Co.* v. *Lee*, 288 U. S. 517 (1933).

POINT IV

The tax at bar does not interfere with the power of Congress over navigation.

Respondents assert (Br., pp. 33-34) that the tax at bar interferes with the paramount power of Congress over navigation. From respondents' bare statement of this contention, it is not clear whether they rely upon the power of Congress under the Commerce Clause to regulate navigation (*Gilman* v. *Philadelphia*, 3 Wall. 713, 724-725 [1866]), or upon the implied power of Congress to make laws carrying into effect the provisions of Article 3, § 2, cl. 1 of the Constitution, which confers admiralty and maritime jurisdiction upon the courts of the United States.

The generic term "commerce" includes navigation, and the power of Congress to regulate interstate and foreign commerce comprehends the control of navigation for that purpose. See *Gilman* v. *Philadelphia*, *supra*. Assuming that the respondents refer, in this connection, to the power of Congress over navigation under the Commerce Clause, this is merely another way of saying that the tax at bar regulates interstate and foreign commerce. Our discussion of the validity of the tax here involved under the Commerce Clause thus covers this point.

If, on the other hand, respondents are to be regarded as relying on the Judiciary Article of the Constitution (Art. 3, § 2, cl. 1), conferring admiralty and maritime jurisdiction on United States courts, their contention is equally without merit. *Standard Dredging Co.* v. *Murphy*, 319 U. S. 306 (1943).

In the case just cited, it was claimed that the New York State Unemployment Insurance tax was an infringement of federal maritime jurisdiction in a situation where, it was alleged, the Federal Government had acted by virtue of the Federal Social Security Act to bar the State tax there involved. What this Court said there is even more pertinent in the situation at bar where it is not even claimed that the Federal Government has acted to preclude the present tax (319 U. S. 306, at p. 310):

> "We hold that nothing in Article 3, § 2 of the Constitution places this tax beyond the authority of the State."

Hence, whether respondents' contention be regarded as based upon the Commerce Clause (Art. 1, § 8, cl. 3) or on the admiralty jurisdiction provision (Art. 3, § 2, cl. 1), the tax at bar is valid and does not constitute an unlawful interference with the power of Congress over navigation.

POINT V

The tax at bar does not violate Article 1, Section 10, Clause 2 of the Constitution of the United States, which prohibits State "imposts or duties on imports or exports".

Respondents assert that this tax necessarily increases the cost of their services and, therefore, the cost of importing and exporting the goods which they load and unload; and that this increase in cost constitutes an impost on exports and imports in violation of Article 1, Section 10, Clause 2 of the Constitution (Point IV, Resp. Br., pp. 31-33).

As has been pointed out in another connection there is not the slightest proof in the record that the economic burden of this tax has in fact been passed on by the respondents to the shipowners, or by the shipowners to the ex-

porters or importers of the goods. Therefore, even if respondents' theory were sound (which it is not), the tax here involved has not actually been shown to be a prohibited impost or duty.

In any event, while the economic burden of the tax, if shifted, would indirectly add to the cost of exporting and importing, it would not render this tax an impost or duty on an export or import. Every federal, state and local tax —just as any other expense—which the respondents pay may possibly be reflected indirectly in their charges to the shipowner and in the shipowner's charges to the exporter or importer. It is obvious, however, that such economic factors are not duties or imposts upon the goods exported or imported.

Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292 (1917), relied on by respondents in this connection, does not support the proposition urged. The State tax involved in that case was directly on a vendor's gross receipts from foreign sales, shipped directly by the vendor from the taxing State to foreign countries. Even assuming that the *Crew Levick* case held that such a tax, imposed directly on the exporter and upon his receipts from his foreign sales, is a duty on exports (and, as we shall see, this is not at all clear), that case is not authority for the proposition that the tax at bar—not measured by receipts of a seller or an exporter of goods, but by the receipts of a stevedore indirectly and remotely connected with the export or sale—is an impost or duty barred by the Export-Import Clause.

It seems more likely, however, that the *Crew Levick* case invalidated the tax there involved, under the Commerce Clause rather than the Export-Import Clause. While the Court stated in that case (245 U. S. at 295) that the "foreign commerce" and "the export" clauses could "for the purposes of this case * * * be regarded as interchangeable * * *", its entire reasoning was based on the Commerce Clause, and it relied for its decision on authorities which involved interstate commerce (see *ibid.*, pp. 295-296,

297-298). Moreover, this Court has repeatedly regarded it as a case decided under the Commerce Clause (see, *e.g.*, *Western Live Stock* v. *Bureau of Revenue*, *supra*, at p. 255; *Adams Mfg. Co.* v. *Storen*, *supra*, at p. 312; *Gwin, White & Prince Inc.* v. *Henneford*, *supra*, at p. 439).

Since the tax involved in the *Crew Levick* case was not allocated in any way, although obviously applied to transactions which covered activities transcending the boundaries of the taxing State, the tax was invalid under the Commerce Clause under the principles since promulgated in the *Adams Mfg. Co.* and *Gwin, White & Prince* cases, *supra*.

CONCLUSION

The final order and judgment in each of the cases should be reversed and the petitioner-Comptroller's determination in each case should be reinstated.

Dated: New York, N. Y., February 28, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
NOV 10 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

ROGER S. BALDWIN,
Counsel for Respondent,
120 Broadway,
New York, N. Y.

SAMUEL M. LANE,
E. RAYMOND SHEPARD,
of Counsel.

BIANE & CO., NEW YORK CITY

INDEX

	PAGE
Statement	1
Opinions Below	2
Jurisdiction	2
Question Presented by the Petitioners	2
I. This Court has never receded from its holding in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), that gross receipts from transportation in interstate commerce may not be subjected to local taxation	3
II. The Commerce Clause was intended to protect interstate commerce from the cumulative burden of local taxes	6
Conclusion	8

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938)	4
Allied Mills, Inc. v. Department of Treasury, 318 U. S. 740 (1943)	6
Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 269 App. Div. 685 (1945)	2
Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 294 N. Y. 906 (1945)	2
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 (1938)	4
Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941)	6
Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252 (1941)	6
Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939)	4, 8
International Harvester Co. v. Department of Treasury, 322 U. S. 340 (1944)	6

PAGE

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 5, 7

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 (1937) 1, 2, 3, 4, 5, 6, 8

Southern Pacific R. R. Co. v. Gallagher, 306 U. S. 167 (1939) 5

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

Statement

The issue in this case is whether the City of New York can levy a tax upon gross receipts derived by respondent from loading and unloading, at piers located within the City of New York, vessels engaged exclusively in interstate and foreign commerce.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held that the State of Washington could not levy such a tax.

Respondent is a West Virginia corporation, which maintains an office in the City of New York and is engaged

in the general stevedoring business (R. 36). During the years 1937-1940, inclusive, it loaded and unloaded steamships at piers located within the City of New York (R. 91).

All of the ships were engaged in interstate or foreign commerce (R. 46).

Petitioners assessed a tax upon this business measured by respondent's gross receipts and respondent, paying under protest the amount assessed, brought this proceeding for refund (R. 32).

Opinions Below

On the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the New York Supreme Court, Appellate Division, First Department, unanimously annulled the determination of the Comptroller of the City of New York, denying respondent's application for refund, and directed that the refund be made (269 App. Div. 685 (1945)) (R. 151).

The order of the Appellate Division was unanimously affirmed by the New York Court of Appeals without opinion (294 N. Y. 906 (1945)).

Jurisdiction

Respondent concedes the jurisdiction invoked by the petitioners.

Question Presented by the Petitioners

Since the facts in this case, in so far as they relate to the taxation of gross receipts from loading and unloading ships in interstate commerce, are identical with the facts in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the sole question presented by petitioners is whether the *Puget Sound* case is still good law.

What petitioners seek, in effect, is a reargument of the *Puget Sound* case. We respectfully submit that there is no occasion for it.

POINT I

This Court has never receded from its holding in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), that gross receipts from transportation in interstate commerce may not be subjected to local taxation.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held, without a dissent, that "a tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts" was invalid under the Commerce Clause in so far as the receipts were derived from loading and unloading ships in interstate commerce. Mr. Justice CARDOZO, writing for the unanimous Court, said at page 94:

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

In the *Puget Sound* case itself and in subsequent decisions commencing with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), this Court sustained taxes on gross receipts from local activities, which, though related to interstate commerce, were separate and distinct therefrom, but it has never sustained such a tax where the local activities consisted entirely of the transportation and movement of goods in interstate commerce.

In the *Western Live Stock* case, *supra*, where this Court

sustained a tax imposed by the State of New Mexico on gross receipts derived from the sale of advertising space in a magazine which had an interstate circulation, Mr. Justice STONE, writing for the majority, pointed out that, although "taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce" is valid (p. 253), "local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional" (p. 255).

In *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 (1938), where this Court sustained a tax imposed by the State of Louisiana based on the horsepower of engines used to propel natural gas through interstate pipe lines, Mr. Justice REED, writing for the majority, clearly differentiated between a tax levied on articles "withdrawn from the transportation movement" and a tax levied on transportation itself (p. 610), and cited the *Puget Sound* case in a footnote to illustrate the type of tax which "has frequently met the condemnation of this Court as a regulation of commerce" (p. 609).

In *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), where this Court invalidated an Indiana gross income tax as applied to interstate sales, Mr. Justice ROBERTS, writing for the majority, also cited the *Puget Sound* case in a footnote to illustrate the type of tax which this Court has repeatedly held to be a "regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8, of the Constitution" (p. 311).

In *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939), where this Court, for at least the third time, struck down the State of Washington gross receipts tax as applied to receipts from interstate commerce, Mr. Justice STONE, writing for the majority, said:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are

> in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, * * *" (p. 437).

In a separate, concurring opinion, Justices BUTLER and MCREYNOLDS cited the *Puget Sound* case (p. 442).

In *Southern Pacific R. R. Co.* v. *Gallagher*, 306 U. S. 167 (1939), where this Court sustained a use and storage tax levied by the State of California, Mr. Justice REED, writing for the majority, said:

> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages, or freight shipments. * * * A tax act as applied to the business of interstate communication is unconstitutional. * * * This rule is applicable to a tax on gross receipts from interstate transportation; * * *" (pp. 174-175).

Referring to the *Puget Sound* case, Justice REED said:

> "* * * the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held nontaxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the Puget Sound Stevedoring Co. case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency" (pp. 178-179).

In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), where this Court sustained a sales tax levied by the City of New York on the sale in New York

City of coal mined in Pennsylvania, Mr. Justice STONE, writing for the majority, said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey * * *" (p. 48).

Petitioners also cite *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941); *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941); *Allied Mills, Inc.* v. *Department of Treasury*, 318 U. S. 740 (1943) and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944). All of these cases deal with the Indiana gross receipts tax and none of them bears upon the constitutionality of a tax upon transportation itself.

We submit that this Court has never questioned its holding in the *Puget Sound* case. On the contrary, it has repeatedly recognized in its later decisions that a state or local tax on gross receipts derived from the transportation and movement of goods in interstate commerce is invalid under the Commerce Clause.

POINT II

The Commerce Clause was intended to protect interstate commerce from the cumulative burden of local taxes.

Petitioners state in their brief (p. 18), "In the case at bar there is no possibility of a burden of cumulative

multiple taxation". Their argument is that because respondent's business activities are confined to the City of New York they are beyond the reach of the taxing authorities of any other State or municipality and hence there is no possibility of this particular respondent being subjected to any additional tax burden.

But the test is not whether the taxpayer is subjected to the risk of multiple taxation but whether interstate commerce is, or can be, subjected to the burden of cumulative multiple taxes regardless of the number of persons on whom the taxes are imposed. The rule against multiple taxation is for the protection of the interstate commerce, not the individual taxpayer.

In *Western Live Stock* v. *Bureau of Revenue, supra,* Mr. Justice STONE said:

> "The vice characteristic of those (taxes) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* Mr. Justice STONE, referring to taxes on interstate transportation or communication, said:

> "Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce" (p. 48).

It was to prevent just such an accumulation of tax burdens upon interstate commerce that the Commerce

Clause was inserted in the Constitution. As Mr. Justice Black pointed out in his dissenting opinion in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 452:

> "The 'disastrous experiences under the Confederation when the states vied in discriminatory measures against each other' united the Constitutional Convention in the conviction that some branch of the Federal Government should have exclusive power to regulate commerce among the States and with foreign nations."

Petitioners miss the point entirely when they assert that there is no possibility of cumulative multiple taxation forbidden by the Commerce Clause merely because this respondent's local business activities cannot be taxed by any other taxing authority.

Conclusion

The doctrine of the *Puget Sound* case remains unimpaired by the subsequent decisions of this Court on which the petitioners rely. The *Puget Sound* case is decisive of the present case and no sound reason exists for a review of the present case by this Court. The petition for certiorari should be denied.

November 8, 1945.

Respectfully submitted,

Roger S. Baldwin,
Counsel for Respondent,
120 Broadway,
New York, N. Y.

Samuel M. Lane,
E. Raymond Shepard,
of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 26 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. [redacted] 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

February 23, 1946.

ROGER S. BALDWIN,
Counsel for Respondent,
120 Broadway,
New York, N. Y.

SAMUEL M. LANE,
BLISS ANSNES,
of Counsel.

BOWNE & CO., NEW YORK CITY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 518

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

CARTER & WEEKES STEVEDORING COMPANY,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

This case presents all but one of the issues which are involved in the case of *McGoldrick, et al.* v. *John T. Clark & Son*, No. 519, and we therefore respectfully refer the Court to our brief in that case.

The only significant distinction between the facts in this case and the facts in the *Clark* case is that none of the stevedoring operations in this case were performed in New Jersey. All were performed within the territorial limits of the City of New York.

Other distinguishing facts, which do not, however, affect the issues of law, may be briefly stated. Respondent, Carter & Weekes Stevedoring Company, is a West Virginia corporation with an office in New York City (R. 27). Most of its stevedoring operations were performed under contract

to Norton, Lilly & Company (as agents for the American and Australian Line of London [Exhibit 6] R. 68), and under contract to A. L. Burbank & Company (R. 40). About 50% of the work was done for the former, 25% for the latter, and 25% for other steamship companies (R. 41). 95% of the vessels that were loaded and discharged by respondent during the years in question were destined to or had arrived from foreign countries. The other 5% were engaged in interstate trade. None were engaged in intrastate trade (R. 29). Most of the vessels carried cargo from Australia to England, unloaded in England, arrived light in New York, and were then loaded by respondent with cargoes for Australia (R. 54). Most of the cargo loaded by respondent came from New Jersey (R. 59).

Respondent, in addition to its gross receipts from stevedoring, had a small amount of income from dividends and interest on which it paid the tax in question (R. 24-25; Exhibits 2-5). The tax returns were received by the Comptroller of the City of New York without protest until July, 1942, when George Marlin, Special Deputy Comptroller of the City of New York, made the following rule:

> "General Business and Financial Tax
>
> "Receipts from Stevedoring Operations carried on entirely within the Territorial Limits of the City of New York are to be Included in the Measure of the Tax. Based upon recent United States Supreme Court decisions subsequent to the *Puget Sound* case, the receipts from stevedoring operations carried on entirely within the territorial limits of the City of New York are to be included in the measure of the tax under the General Business and Financial Tax Law. No apportionment is necessary since the measure of the tax is restricted to receipts from activities carried on exclusively within the City of New York. Dated: July 13, 1942. George Marlin, Special Deputy Comptroller" (R. 23).

Thereafter, respondent received a notice of deficiency assessment in the amount of $2,352.75 on account of its non-payment of the tax on its gross receipts from stevedoring operations (R. 10, 23).

Respondent denied its liability to pay the deficiency assessed, asked for a hearing (R. 19) and deposited $2,352.75 with the Treasurer of the City of New York pursuant to the provisions of the Administrative Code of the City of New York in order to obtain a review (R. 20-21).

This proceeding was instituted to require the Treasurer of the City of New York to refund said deposit.

Conclusion.

Respondent respectfully submits that the final order and judgment of the lower court directing the refund of the deposit in question should be affirmed.

Respectfully submitted,

ROGER S. BALDWIN,
Counsel for Respondent.

SAMUEL M. LANE,
BLISS ANSNES,
of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

Nos. 518, 519 29-30

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

CARTER & WEEKES STEVEDORING COMPANY, Respondent.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

JOHN T. CLARK & SON, Respondent.

MOTION FOR LEAVE TO FILE and BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

January 28, 1946

SMITH TROY,
Attorney General, State of Washington.

JESS N. ROSENBERG,
Assistant Attorney General, State of Washington.

Attorneys for State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

Nos. 518, 519

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

CARTER & WEEKES STEVEDORING COMPANY, Respondent.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

JOHN T. CLARK & SON, Respondent.

MOTION FOR LEAVE TO FILE and BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

January 28, 1946

SMITH TROY,
Attorney General, State of Washington.

JESS N. ROSENBERG,
Assistant Attorney General, State of Washington.

Attorneys for State of Washington.

Office and Postoffice Address: Temple of Justice, Olympia, Wash.

INDEX

Page

Motion for Leave to File 3

Brief:

Statement of the Case 5

Argument:

I. Decisions of the Supreme Court of the United States indicate the tests to be applied in determining the validity of taxes similar to those in the *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U. S. 90, (1937) case, and in the cases at bar 7

II. The Washington state tax which was under consideration in the *Puget Sound* case, *supra*, meets the tests which decisions of the Supreme Court of the United States since 1938 have set forth 8

Conclusion 10

TABLE OF CASES CITED

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938) 7

Fisher's Blend Station, Inc. v. Tax Commission, 297 U. S. 650 (1936) 9

Gwin, White & Prince, Inc. v. Henneford et al., 305 U. S. 434 (1939) 7

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 8

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U. S. 90 (1937) 5, 6, 8, 9, 10, 11

Western Live Stock v. Bureau, 303 U. S. 250, 254 10

TABLE OF STATUTES CITED

Title II, Revenue Act of 1935, as amended; Rem. Rev. Stat. 8370-4 et seq. 5

CONSTITUTION

United States Constitution:

Article I, section 8 9

OTHER AUTHORITIES CITED

Petitioners' brief in support of Petition for Writ of Certiorari to the Supreme Court of the State of New York in cases at bar, p. 12 ..... 6, 8

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

Nos. 518, 519

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

CARTER & WEEKES STEVEDORING COMPANY, Respondent.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

JOHN T. CLARK & SON, Respondent.

MOTION FOR LEAVE TO FILE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

Come now Smith Troy, Attorney General for the State of Washington, and Jess N. Rosenberg, an Assistant Attorney General of the State of Washington, and move the court that leave be granted to file Brief of the Attorney General of the State of Washington as Amicus Curiae in the above entitled causes, pursuant to Rule 27 (9) of the Supreme Court of the United States.

SMITH TROY,
Attorney General, State of Washington,

JESS N. ROSENBERG,
Assistant Attorney General, State of Washington,

Attorneys for the State of Washington.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1945

Nos. 518, 519

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

CARTER & WEEKES STEVEDORING COMPANY, Respondent.

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, Petitioners,

v.

JOHN T. CLARK & SON, Respondent.

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

STATEMENT OF THE CASE

The State of Washington has filed its brief as a friend of the court in the cases at bar because its business and occupa on tax (Title II, Revenue Act of 1935, chapter 180, Laws of 1935, as amended, Rem. Rev. Stat. 8370-4 *et seq.*) was the tax under consideration in *Puget Sound*

Stevedoring Co. v. State Tax Commission ('37), 302 U. S. 90, 58 Sup. Ct. 72, modifying 189 Wash. 131, 63 Pac. 2d 532. The court below based its decision solely on the *Puget Sound* case (Petitioners' Brief in support of Petition for Writ of Certiorari to the Supreme Court of the State of New York, herein, p. 12). In the light of these facts the granting of the Petition for Writ of Certiorari in these cases must involve a reconsideration of the *Puget Sound* case. The State of Washington takes the position now, as it did in 1937, that the *Puget Sound* case was improperly decided and should be overruled.

The State of Washington adopts the briefs of Petitioners in the cases at bar.

ARGUMENT

I.

Many cases involving the rights of the several states to measure tax liability by the inclusion in the measure of tax of receipts from the business of engaging directly or indirectly in interstate commerce have been considered by this court since 1937 (Brief of City of New York, *supra*). From these cases the tests to be applied in determining validity will be seen to be:

a. If the imposing state is free to exact the tax, may other states to which the commerce extends lay a tax similarly measured for the privilege of conducting within the respective territorial limits the activities there which contribute to the service? (*Gwin, White & Prince, Inc. v. Henneford et al.* ('39), 305 U. S. 434, 59 Sup. Ct. 325, reversing 193 Wash. 451, 75 Pac. 2d 1017).

b. Does the tax discriminate against interstate commerce by seeking to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state? (*Gwin, White & Prince, Inc. v. Henneford et al., supra*).

c. Does the imposition of the tax subject interstate commerce to the risk of a double tax burden to which intrastate commerce is not exposed? (*J. D. Adams Manufacturing Co. v. Storen et al.* ('38), 304 U. S. 307, 58 Sup. Ct. 913, affirming in part and reversing in part 212 Ind. 343, 7 N. E. 2d 941).

II.

Applying the above tests to the Washington law, which was under consideration in the *Puget Sound* case, a tax on a stevedoring company measured by its receipts from local handling of freight moving in interstate commerce, should be sustained because:

a. No other state to which the commerce extends may lay a similarly measured tax on the stevedoring company, for the privilege of doing a stevedoring business in the State of Washington. It is true that the cost of handling goods moving in interstate commerce may be increased when stevedoring companies in another state, handling the same goods, are required to pay such a tax in the other state, but that is equally true of all local charges and costs of doing business, such as office rental, light and power charges, cost of equipment, labor costs, etc.

> "But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business, *Western Live Stock v. Bureau*, 303 U. S. 250, 254. * * *" (*McGoldrick v. Berwind-White Coal Mining Co.* ('40), 309 U. S. 33, 60 Sup. Ct. 388, reversing 281 N. Y. 610, 670, 22 N. E. 2d 173, 764.)

Should the sovereign state of Washington be placed in a poorer position with respect to making reasonable charges for the services or privileges it furnishes than private individuals within its borders who also furnish services and privileges and make a charge therefor to

persons engaged in and receiving their entire incomes from interstate commerce? Does one charge *burden* that commerce more or less than the other? Does not the determination of the merits of such distinctions rest with the Congress of the United States, which has been given the power to regulate interstate commerce by Article I, section 8, United States Constitution, a power which the ingenuous peruser of decisions of the United States Supreme Court, prior to 1938, might well have assumed had been delegated to the court?

b. There is no suggestion of discrimination in the application of the tax to the privilege of doing business as a stevedoring company. The tax applies to all persons engaging in all businesses. If the tax is held not to apply, then a purely local business, sharing the benefits of local government, receives a discrimination in its favor, relief from a tax burden borne by all other local business men. In the state of Washington this unfair result obtains with respect to stevedoring companies (*Puget Sound* case, *supra*) and local broadcasting companies (*Fisher's Blend Station, Inc. v. Tax Commission et al.* ('36), 297 U. S. 650, 56 Sup. Ct. 608, reversing and remanding 182 Wash. 163, 45 Pac. 2d 942, 49 Pac. 2d 1151). This type of actual discrimination against intrastate commerce should give the court fully as much concern as it has given to possible discrimination against interstate commerce.

c. There is no possibility of any duplication of the tax sought to be imposed. The stevedoring company only does business locally. The goods it handles move in

interstate commerce, not the company. No other state can possibly require a tax from the stevedoring company for the privilege of doing business in the state of Washington. Certainly no other state has ever attempted to charge the Puget Sound Stevedoring Company a tax based on receipts from business done in this state.

CONCLUSION

The *Puget Sound Stevedoring* case, *supra*, should be overruled because:

1. The imposition of the tax has merely an incidental or consequential effect on increasing the cost of doing an interstate business to shippers generally and this is not sufficient to relieve the stevedoring company from its just share of a state tax burden (*Western Live Stock v. Bureau, supra*).

2. Imposition of the tax does not discriminate against interstate commerce. The granting of an exemption to the stevedoring company creates a discrimination against those other local businesses which are carrying their fair share of the burdens of local government.

3. The imposition of Washington's business and occupation tax upon the stevedoring company measured by its receipts for carrying on local activities with respect to freight moving in interstate commerce, cannot be duplicated by any other jurisdiction with respect to the same activity.

It follows, with the overruling of the *Puget Sound* case, *supra*, that the order and judgment of the Supreme Court of the State of New York in the cases at bar should be reversed and tax liability of the respondents confirmed.

Respectfully submitted,

SMITH TROY,
Attorney General of the State of Washington,
JESS N. ROSENBERG,
Assistant Attorney General, State of Washington.
Attorneys for State of Washington.

FILE COPY

Office - Supreme Court, U. S.
FILED
FEB 4 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*,
vs.
CARTER & WEEKS STEVEDORING COMPANY, *Respondent*.
No. 618 29

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*,
vs.
JOHN T. CLARK & SON, *Respondent*.
No. 619 30

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PUGET SOUND STEVEDORING COMPANY ACTING ON BEHALF OF ASSOCIATION OF WASHINGTON STEVEDORES, AS *AMICUS CURIAE*

GROSSCUP, AMBLER & STEPHAN,
JOHN AMBLER,
BEN C. GROSSCUP,
ALBERT E. STEPHAN,
Attorneys for Amicus Curiae.

Address:
807 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*, vs. CARTER & WEEKS STEVEDORING COMPANY, *Respondent.*	No. 518
JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*, vs. JOHN T. CLARK & SON, *Respondent.*	No. 519

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PUGET SOUND STEVEDORING COMPANY ACTING ON BEHALF OF ASSOCIATION OF WASHINGTON STEVEDORES, AS *AMICUS CURIAE*

GROSSCUP, AMBLER & STEPHAN,
JOHN AMBLER,
BEN C. GROSSCUP,
ALBERT E. STEPHAN,
Attorneys for Amicus Curiae.

Address:
807 Central Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

	Page
Authority to Appear	1
Occasion for This Brief	2
Other Services of Puget Sound Company	4
Instant Cases	5
No Present Decision of This Court Requires a Modification or Reversal of the *Puget Sound* Case	5
General Discussion	6
A "long" and "unbroken" line of decisions invalidate gross receipts taxes directly laid on interstate and foreign transportation and communication	9
Argument advanced for reversal of the *Puget Sound* case	14
(1) As the tax is laid upon activities necessarily confined to a single state there is no chance of a cumulative tax burden from another state, so it is not forbidden by the commerce clause	14
(2) This Court is increasingly inclined to disregard "formal" distinctions between types of taxes	17
Formalism, practicality and pragmatism	23
The State of Washington has broad powers of taxation over the operations of the Puget Sound Company	26
Change in the rules should come from congress	28
Conclusion	30
Appendix I ..... following page	30
State of Washington Business and Occupation Tax.	
Appendix II ..... Appendix	3
Seattle Business Tax Ordinance, Ordinance No. 72630 ..... 16 and Appendix	3

TABLE OF CASES

	Page
Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938)	6, 10
American Manufacturing Co. v. St. Louis, 250 U.S. 459 (1919)	26
Atlantic Coast Line v. Daughton, 262 U.S. 413 (1923)	9
City of New Orleans v. Texas Transport & Terminal Co., 152 La. 497, 93 So. 751 (1922)	11
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938)	6
Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918)	27
Fargo v. Michigan, 121 U.S. 230 (1887)	10
Ficklen v. Shelby County Taxing District, 145 U.S. 1 (1892)	26
Fisher's Blend Station v. Tax Commission, 182 Wash. 163, 45 P.(2d) 942, reversed 297 U.S. 650	11, 15, 23
Ford v. Beauchamp, 308 U.S. 331 (1930)	27
Galveston H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908)	11
General Trading Co. v. State Tax Commission of the State of Iowa, 322 U.S. 335 (1944)	19, 20
Great Northern Ry. Co. v. Minnesota, 278 U.S. 503 (1929)	27
Gwin, White & Prince v. Henneford, 305 U.S. 434 (1939)	6, 10, 28
Illinois Central R. R. Co. v. Minnesota, 309 U.S. 157 (1940)	22, 27
International Harvester v. Department of Treasury, 322 U.S. 340 (1944)	7, 19, 20
International Shoe Co. v. State of Washington, 66 Sup. Ct. 154 (1945) ..... U.S.	28
James v. Dravo Contracting Co., 302 U.S. 134 (1937)	5
Maine v. Grand Truck, 142 U.S. 217 (1891)	26
Matson Navigation Company v. State Board, 297 U.S. 441 ((1936)	9, 26

Page

McGoldrick v. Berwind-White Coal Co., 309 U.S. 33 (1940) 6, 7, 21, 24
McLeod v. Dilworth Co., 322 U.S. 327 (1944) 17, 19, 20, 21, 24
Meyer v. Wells Fargo & Co., 223 U.S. 298 (1912) .. 11
Murdock v. Pennsylvania, 319 U.S. 105 (1943) 6
N. J. Bell Telephone Co. v. State Board of Taxes, 280 U.S. 338 (1930) 11, 15
Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) 6, 22
New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937) 9
Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944) 6, 12, 26
Old Dominion S.S. Co. v. Virginia 198 U.S. 299 (1905) 26
Pacific Tel. & Tel. Co. v. Tax Commission, 183 Wash. 697, 48 P.(2d) 938, affirmed 297 U.S. 403 23
Paramount v. Henneford, 184 Wash. 376, 51 P. (2d) 385, cert. den., 298 U.S. 665 23
Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U.S. 326 (1887) 10
Puget Sound Stevedoring Co. v. Tax Commission, 189 Wash. 131, 63 P.(2d) 532, 302 U.S. 90 (1937) ... 2, 5, 6, 8, 10, 11, 13, 14, 15, 22, 23, 27, 30
Pullman Co. v. Richardson, 261 U.S. 330 (1923) .. 27
Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888) ..... 1(
Southern Pacific Co. v. Gallagher, 306 U.S. 167 (1939) .....
Spector Motor Service v. McLaughlin—Supreme Court—65 Sup. Ct. 152 (1945) .....
Spector Motor Service v. Walsh, 139 F.(2d) 80((1944) .....
State ex rel. Stiner v. Yelle, 174 Wash. 402, P.(2d) 91 .....
Storaasli v. Minnesota, 283 U.S. 57 (1931) .....

Page

Supply Laundry v. Jenner, 178 Wash. 72, 34 P. (2d) 363 23
Texas Transport v. New Orleans, 264 U.S. 150 (1924) 11, 13, 15
Underwood Typewriter v. Chamberlain, 254 U.S. 113 (1928) 8
U. S. Express Co. v. Minnesota, 233 U.S. 335 (1912) 27
U. S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918) 8
Walling v. Goldblatt Bros., 128 F.(2d) 778 (1942) 4
(1942) 4
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 5, 6, 10, 30
Western Union Tel. Co. v. Alabama, 132 U.S. 472 (1889) 11
Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379 (1903) 26

TEXTBOOKS

Lockhart, The Sales Tax in Interstate Commerce (1939) 52 Harvard Law Review 617..... 7
Lockhart, 57 Harvard Law Review 40 (1943) 6, 9, 10, 11, 15, 17, 21, 29
Webster's New International Dictionary..... 24

STATUTES

Laws of Washington 1935, Ch. 180, as amended .....Appendix 1, 2
Laws of Washington 1941, Ch. 178.....Appendix 2
Laws of Washington 1943, Ch. 156.....Appendix 7
Laws of Washington 1945, Ch. 249.....Appendix 1
Remington's Revised Statutes of Washington:
§8370-4 .....Appendix 1
§8370-12 .....Appendix 2
§8370-187 .....Appendix 2

COURT RULES

Revised Rules of the Supreme Court of the United States, Rule 27, Par. 9..... 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*, vs. CARTER & WEEKS STEVEDORING COMPANY, *Respondent.*	No. 518
JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York, *Petitioners*, vs. JOHN T. CLARK & SON, *Respondent.*	No. 519

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF PUGET SOUND STEVEDORING COMPANY ACTING ON BEHALF OF ASSOCIATION OF WASHINGTON STEVEDORES, AS *AMICUS CURIAE*

AUTHORITY TO APPEAR

This brief is filed in conformity with Rule 27, Paragraph 9, of the Revised Rules of the Supreme Court of the United States. The parties to this action through their respective counsel have consented in writing to the filing of this brief and the consent has been duly filed with the Clerk of this Court.

OCCASION FOR THIS BRIEF

On November 8, 1937, Mr. Justice Cardozo delivered the unanimous opinion of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90. Two of the present members of the Court participated in the decision in the case. The unanimous Court in the *Puget Sound* case held that a statute of the State of Washington which imposed a tax of one-half of one per cent upon the gross business of a taxpayer for the privilege of engaging in business activities within the state, could not constitutionally be imposed upon the gross receipts of a stevedoring company under the following state of facts:

1. Puget Sound Company was a Washington corporation.

2. It contracted with shipowners and shipmasters to load or discharge vessels through its employees which it controlled and directed.

3. All vessels involved were engaged exclusively in interstate or foreign commerce.

4. The stevedoring operation was limited to the movement of the cargo between the hold of the vessel and "first place of rest" and vice versa.

5. The movement between the hold of the vessel and "first place of rest" and vice versa was *continuous* and was always covered by one contract.

The longshoremen employed by the Puget Sound Company, operating in the hold of a vessel, unstowed the cargo and placed it upon a sling which would be raised by the ship's gear from the hold of the vessel and lowered to the dock, or pier, where other long-

shoremen employed by the Puget Sound Company would transport same as a continuous movement to the "first place of rest." When loading a vessel the reverse would occur and longshoremen employed by the Puget Sound Company would transport the cargo from a "place of rest" on the dock as a continuous movement to ship's tackle, which would lift the cargo into the hold of the vessel where it would be stowed by longshoremen employed by the Puget Sound Company. It is clear that the Puget Sound Company in the above operation was engaged in interstate or foreign commerce. Mr. Justice Cardozo, in his opinion at pages 92-93, said:

> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners".' *Atlantic Transport Co. v. Imbrovek*, 234 U.S. 52, 62. No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. *Baltimore & O.S.W.R. Co. v. Burtch*, 263 U.S. 540. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act (41 Stat. 988, 1007), a stevedore is a 'seaman.' *International Stevedor-*

ing Co. v. Haverty, 272 U.S. 50. A stipulation in the record tells us that any serious interruption in the service of such cargo handlers cripples at once the activities of a port and slows down and obstructs the free and steady flow of commerce. We might take judicial notice of the fact if the stipulation were not here."

See *Walling v. Goldblatt Bros.*, 128 F.(2d) 778, 782 (1942), where the court said:

> "Whether workmen unloading out-of-state goods at the warehouses are 'in commerce,' depends upon when these come to rest and lose their interstate character. They have not reached their destination until actually unloaded and deposited on the warehouse platform. Then and not until then, their interstate journey is at an end." (Citing many authorities)

OTHER SERVICES OF PUGET SOUND COMPANY

In addition to the services of the Puget Sound Company outlined above it performed a second service whereby it did not directly participate in the work of loading and discharging a vessel, but on the other hand merely collected longshoremen and supplied them for employment by the vessel and her owner, advancing their pay at the end of the job and billing the vessel and her owner for the amount of the payroll plus a commission for this service. The Court found that this activity of the Puget Sound Company while an aid to the interstate and foreign commerce was not itself "interstate or foreign commerce" but was a local business in the nature of a labor or employment agency and earnings derived from such activities were properly taxed by the state.

INSTANT CASES

From an examination of the transcripts of record the facts in the instant cases appear quite similar to those involved in the *Puget Sound* case. The record in Case No. 519 indicates some services of the stevedoring company there involved which are a little remote from actual cargo handling (Tr. 59). The Supreme Court of New York, Appellate Division, First Department, in Case No. 518, unanimously annulled the imposition of a tax of the City of New York upon the gross receipts of a stevedoring company upon the authority of the *Puget Sound* case (Tr. 77). This action was affirmed by the Court of Appeals of the State of New York (Tr. 79) without opinion (Tr. 83). The same action was taken by the New York Court in Case No. 519 (Tr. 124; 125, 130). This brief is limited solely to upholding the decision of the Court in the *Puget Sound* case. It will not discuss the facts of the two New York cases.

NO PRESENT DECISION OF THIS COURT REQUIRES A MODIFICATION OR REVERSAL OF THE *PUGET SOUND* CASE.

The case of *Puget Sound Stevedoring Co. v. Tax Commission* has been referred to or distinguished by the United States Supreme Court ten times since its decision and has never been disapproved or questioned. The ten cases are as follows:

James v. Dravo Contracting Co., 302 U.S. 134, 185 (1937);

Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 258 (1938);

Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 609 (1938);

J. D. Adams Manufacturing Co. v. Storen, 304 U.S. 307, 312 (1938);

Gwin, White & Prince v. Henneford, 305 U.S. 434, 442 (1939);

Southern Pacific Co. v. Gallagher, 306 U.S. 167, 178, 179 (1939);

McGoldrick v. Berwind-White Coal Co., 309 U.S. 33, 62 (1940);

Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 369 (1941);

Murdock v. Pennsylvania, 319 U.S. 105, 133 (1943);

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

GENERAL DISCUSSION

This direct attack on a unanimous opinion of this Court, rendered slightly over eight years ago, is primarily based upon the following article which appeared in the Harvard Law Review:

"Gross Receipts Taxes on Interstate Transportation and Communication," 57 Harv. L. Rev. 40 (1943).

The author of this article, William B. Lockhart, then Associate Professor of Law, Stanford University, forecast the reversal by this Court of the *Puget Sound* case. The author of the article bases his conviction upon what he terms the "new attitude" and "new approach" of the Court inaugurated by the case of *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (pp. 41, 91).

The author of this very able article frankly takes credit through an earlier article in the same publication for the action of this Court in *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940). He says on page 87:

> "* * *. For a period of over fifty years the Supreme Court has ruled that a tax on an interstate sale is invalid because such a sale 'is interstate commerce' which 'cannot be taxed at all.' In 1939, it was pointed out that the cases so holding all involved drummer's license taxes which were more soundly condemned on practical grounds, and that other practical considerations should influence the Court to sustain a sales tax measured by the sales price on interstate sales when imposed by the buyer's state provided the Court would be willing to ignore or overrule the formal dogma it had been announcing for fifty years.[192] And in 1940 it did just this in the *Berwind-White* case. * * *"

Note 192 is as follows: "See Lockhart, *The Sales Tax in Interstate Commerce* (1939) 52 Harv. L. Rev. 617, 620-28, 644."

The 1943 article (which alone will be considered hereafter in this brief) is cited by Mr. Justice Douglas in his opinion in *International Harvester v. Department of Treasury*, 322 U.S. 340, 346 (1944), as authority for the following statement:

> "* * * Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels * * *, we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon the gross receipts from an interstate sale.' * * *"

This Article was likewise cited in *Spector Motor Service v. Walsh*, 139 F.(2d) 809 (1944), at page 814, and clearly influenced the majority of the Court of Appeals of the Second Circuit to "examine certain specific trends" (p. 814) supposedly disclosed by this Court; in particular what the Court of Appeals termed the trend of this Court "away from the automatic condemnation of taxes by formal, preconceived, and antiquated rules" (p. 814).

When the *Spector* case reached the Supreme Court in *Spector Motor Service v. McLaughlin*, ... Supreme Court ....., 65 Sup. Ct. 152 (1945) the Supreme Court sent the case back to permit the Connecticut courts to determine what the statute actually purported to cover. The *Spector* case is of interest here here for this language in the Supreme Court decision (at p. 153):

> "If Connecticut in fact sought to tax the right to engage in interstate commerce, a long course of *constitutional history* and an *'unbroken line of decisions'* would indeed be brought into question." (Emphasis ours)

The *Spector* case involved a franchise tax upon the *net income* of a foreign corporation engaged wholly in interstate transportation. The tax on *gross income* involved in the *Puget Sound* case is in many ways more objectionable than the tax laid on *net income* involved in the *Spector* case.

U. S. Glue Co. v. Oak Creek, 247 U.S. 321 (1918);

Underwood Typewriter v. Chamberlain, 254 U.S. 113 (1920);

Atlantic Coast Line v. Daughton, 262 U.S. 413 (1923);

Matson Navigation Company v. State Board, 297 U.S. 441 (1936);

New York ex rel. Cohn v. Graves, 300 U.S. 308 (1937).[1]

The line of cases invalidating the imposition of such a direct tax on gross receipts from interstate and foreign transportation and communication is equally "long" and "unbroken."

A "LONG" AND "UNBROKEN" LINE OF DECISIONS INVALIDATE GROSS RECEIPTS TAXES DIRECTLY LAID ON INTERSTATE AND FOREIGN TRANSPORTATION AND COMMUNICATION

Professor Lockhart commences his Article by emphasizing what he considers to have been in 1938 a change in the "venerable decisions which had long been the repositories of the ancient formula condemning state taxes on gross receipts from interstate commerce" (p. 40). He speaks of these decisions on page 43 as "a hoary dogma." On page 62 of the article he states:

> "In 1936 the rule against taxing gross receipts from interstate transportation and communication was still firmly entrenched."

He frankly recognizes that the *Puget Sound* case followed an uninterrupted line of decisions of this court extending over a period of many years. We emphasize this as the Court is not being asked in the instant case

---

[1] See also Professor Lockhart's Article, page 65, note 95.

to overrule a single case which possibly did not fit into the pattern of its other decisions. It is asked to overturn a long fixed rule of constitutional law. The views of Mr. Justice Douglas, expressed in his dissents in *Adams Mfg. Co. v. Storen*, 304 U.S. 307, 324 (1938) and *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 453 (1939), to the effect that the imposition of the tax forbidden in the *Puget Sound* case was of relatively modern origin are not shared by Professor Lockhart. Nor are they shared by a majority of this Court. In *Gwin, White & Prince v. Henneford*, 305 U.S. 434 (1939), Mr. Justice Stone said:

> "For half a century, following the decision in *Philadelphia & So. SS Co. v. Pennsylvania*, 122 U.S. 326, *it has not been doubted* that state taxation of local participation in interstate commerce, measured by the entire volume of the commerce, is likewise foreclosed." (Emphasis ours)

This statement was made a year after the case of *Western Live Stock v. Bureau of Revenue* on which Professor Lockhart so heavily relies. Chief Justice Stone rendered both opinions.

On page 40 of his article, Professor Lockhart says:

> "From 1887 to 1937 the Supreme Court expressly invalidated nine non-discriminatory state taxes imposed on or measured by gross receipts from interstate commerce. All of these involved receipts from transportation or communication."

These nine cases are:

Philadelphia & So. S. S. Co. v. Pennsylvania, 122 U.S. 326 (1887);

Fargo v. Michigan, 121 U.S. 230 (1887);

Ratterman v. Western Union Tel. Co., 127 U.S. 411 (1888);

Western Union Tel. Co. v. Alabama, 132 U.S. 472 (1889);

Galveston H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908);

Meyer v. Wells Fargo & Co., 223 U.S. 298 (1912);

N. J. Bell Telephone Co. v. State Board of Taxes, 280 U.S. 338 (1930);

Fisher's Blend Station, Inc., v. State Tax Commission, 297 U.S. 650 (1936);

Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90 (1937).

He summarizes these decisions on page 65 of his Article.

This Article does not mention the case of *Texas Transport v. New Orleans*, 264 U.S. 150 (1924), decided thirteen years before the *Puget Sound* case. The *Texas Transport* case involved a city ordinance of the City of New Orleans described as follows by the lower court which upheld the tax:

City of New Orleans v. Texas Transport & Terminal Co., 152 La. 497, 93 So. 751 (1922):

"The ordinance in question, No. 6608 of the commission council of New Orleans, is the *general revenue law* of the city. It levies a graded license tax upon every business, trade or occupation that is subject to taxation. The tax levied upon the business of steamship agents is graded according to the *annual gross receipts* of the business, and is $400 per annum when the year's receipts amount to $100,000 or more. The receipts of defendant's business exceeded $100,000 and defendant is therefore liable for the tax of

$400, unless the business is interstate or foreign commerce.

"The record does not show whether defendant is a domestic or foreign corporation, but that is a matter of no importance.[2] The main office, or what is called the home office, of the company, is in New York. The establishment in New Orleans, carrying on the business that is the subject of this litigation, is referred to in the testimony as a branch office. * * *" (Emphasis ours)

The Texas Transport Company was an independent steamship agency acting as such for various foreign steamship companies. Its operations were sufficiently extensive so that its tax was no longer measured by gross receipts and the maximum fee of $400.00 a year applied. The majority of this Court reversed the state court and held the tax unconstitutional under the Commerce Clause although it was a wholly non-discriminatory tax and although the taxpayer, a local independent concern, was merely included in a general taxing ordinance, and although the particular receipts did not appear to have been taxable by any other state. Mr. Justice Holmes and Mr. Justice Brandeis dissented on two grounds: First, the tax in the case of the *particular* taxpayer, on account of its extensive operations, was a flat tax of $400 per annum and so unlike a gross receipts tax in that it did not lay "a burden upon every transaction" (p. 157); second, the services of the taxpayer were not limited to

---

[2]See authorities cited in dissenting opinion of Mr. Justice Stone in *Northwest Airlines v. Minnesota*, 322 U.S. 292, 316 (1944).

interstate commerce such as "soliciting" cargo or passengers (p. 157).

As to the first ground of dissent, the two Justices in the *Texas Transport* case frankly recognized the propriety of the decision in the *Puget Sound* case where there was no "ceiling" on the tax by the following language:

> "On the other hand, the burden is deemed direct, where the tax is upon property moving in interstate commerce * * * or where it lays, like a gross receipts tax, a burden upon every transaction in such commerce, 'by withholding, for the use of the state, a part of every dollar received in such transactions' * * *." (p. 156)

In connection with the second ground for dissent, the dissenting opinion outlined the various activities in which the Texas Transport was engaged which included "arranging with independent stevedoring concerns for discharging and loading cargoes." It will be observed that such a local function of Puget Sound Company was found taxable in the *Puget Sound* case and that Mr. Justice Brandeis concurred in the *Puget Sound* decision which thus answered *both* of the above objections he had raised in his dissenting opinion in the *Texas Transport* case.

The *Texas Transport* case is direct authority for the *Puget Sound* case and follows the "long" and "unbroken" line of decisions invalidating the imposition of such taxes on interstate and foreign transportation and communication.

ARGUMENT ADVANCED FOR REVERSAL OF THE *PUGET SOUND* CASE

The argument advanced by Professor Lockhart for the reversal of the unanimous opinion of this Court in the *Puget Sound* case may be summarized as follows:

(1) As the tax is laid upon activities necessarily confined to a single state there is no chance of a cumulative tax burden from another state so it is not forbidden by the Commerce Clause.

(2) This Court is increasingly inclined to disregard "formal" distinctions between types of taxes. It should thus reverse its opinion in the *Puget Sound* case as the gross receipts there taxed can be taxed by another type of tax. The constitutionality of a tax should rest upon substance rather than form.

We shall discuss in order these two points.

(1) As the tax is laid upon activities necessarily confined to a single state there is no chance of a cumulative tax burden from another state, so it is not forbidden by the commerce clause.

It is quite true that the tax in the *Puget Sound* case was laid upon the gross receipts of a Washington corporation engaged wholly in the loading and discharging of cargoes moving continuously in interstate or foreign commerce *within the State of Washington.* This particular activity of the Puget Sound Company

obviously cannot be reached by another *state*.[3] But assuming that a danger of a cumulative tax is necessary the gross receipts in question can be the subject of cumulative taxation by other taxing bodies in the *same state*.

Professor Lockhart, at page 83 of his Article, emphasizes the danger of a second tax in the *same state* based upon the same subject matter. He says:

> "* * * A second tax by which the *same state* seeks to tax the intangible values arising out of the receipts should be avoided. It will be recalled that *United States Express Co. v. Minnesota* distinguished both the *Galveston* and *Wells Fargo* cases on the ground that in those cases the taxes attempted to reach the gross receipts from interstate commerce when there was already another tax on the property covering its full value as a going concern. The Court did not pursue the point further, since it only needed to demonstrate that the taxes in those two cases could not possibly be classified as in lieu of property taxes. Neverthe-

---

[3]It has not been considered necessary in the past that the danger of a cumulative tax be present:

Galveston H. & S. A. Ry. v. Texas, 210 U.S. 217 (1908);

Texas Transport Co. v. New Orleans, 264 U.S. 150 (1924);

N. J. Bell Telephone Co. v. State Board, 280 U.S. 338 (1930);

Fisher's Blend Station v. Tax Commission, 297 U.S. 650 (1936);

Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90 (1937).

> lese this distinction could be invoked if the present Court were inclined to view with disfavor two attempts by the same state to tax the economic value resulting from earnings derived from interstate transportation. While such a tax system would not threaten interstate transporation with a burden not borne by local transportation, it might be thought to threaten transportation in general with more than its fair share of the local tax burden in such a manner as to result in serious repercussions on interstate traffic." (p. 83) (See also p. 51, note 49)

The danger pointed out by Professor Lockhart actually exists in the State of Washington and such danger applies to Puget Sound at the present time. In Appendix I to this brief we quote the present provisions of the state law imposing the state "Business and Occupation Tax" upon the taxpayer which was declared unconstitutional in so far as certain operations of Puget Sound were concerned. In Appendix II we quote the pertinent portions of a City Ordinance of the City of Seattle which creates a similar Business and Occupation Tax upon persons engaged in business in that city, the principal seaport of the State of Washington and principal place of business of the Puget Sound Company. Both taxes are laid directly on gross receipts from the same transaction.

It might be also mentioned at this point that there would seemed to be no reason why the State of New York should not enact such legislation following the lead of the City of New York, thus reversing the order of imposing the tax by the two taxing bodies in the State of Washington. In such case interstate move-

ments by water between the State of New York and the State of Washington would have four gross receipts taxes on the loading and unloading of the vessel involved in water transportation between the two states. There may be other taxing bodes in both states to whom taxation privileges have been granted who might likewise add their burden to the movement between the two states.

Gross receipts taxes are a direct burden upon every ton of cargo moved. As they are cumulatively applied their ultimate potential burden is substantial as this court has repeatedly recognized. Oregon and California have no such tax.

(2) This Court is increasingly inclined to disregard "formal" distinctions between types of taxes.

Professor Lockhart, in his Article, repeatedly refers to what he considers the increasing tendency of this Court to disregard "formal" distinctions in taxes (pp. 52, 58, 85, 91). The trend, if any, suggested by Professor Lockhart seems to have somewhat slowed down the year following the publication of his Article.

In *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944), a Tennesse corporation which was not qualified to do business in Arkansas and which had no sales office nor any other place of business in Arkansas, made sales of goods in Tennessee for delivery by common carrier in Arkansas. Orders for goods were solicited in Arkansas by traveling salesmen domiciled in Tennessee, or by mail or telephone. When an order was placed it required acceptance by the Tennessee office and, on approval, the goods were shipped from Tennessee to

the buyer in Arkansas, title passing upon delivery to the carrier in Tennessee. Collection of the sales price was not made in Arkansas. The tax on such transactions imposed by the State of Arkansas was construed by the Arkansas Supreme Court as "a *retail sales tax* and *not* a *use tax*" (Emphasis ours). It was known as the "Gross Receipts Tax" (p. 328). Mr. Justice Frankfurter delivering the majority opinion recognized that the imposition of taxes must have a boundary and that "A boundary line is none the worse for being narrow" (p. 329). In declaring the tax unconsitutional he added:

> "* * * A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase—a freedom which wartime restrictions serve to emphasize. A use tax is a tax on the enjoyment of that which was purchased. * * *
>
> "* * * Though sales and use taxes may secure the same revenues and serve complementary purposes, they are, as we have indicated, taxes on different transactions and for different opportunities afforded by a State." (pp. 330-1)

Mr. Chief Justice Stone, Mr. Justice Roberts, Mr. Justice Reed and Mr. Justice Jackson joined with the author of this opinion. Mr. Justice Douglas, Mr. Justice Black, Mr. Justice Murphy and Mr. Justice Rutledge dissented. The basis of the dissenting of the first three may be found in the following language from

the dissenting opinion of Mr. Justice Douglas, at page 333:

> "* * * But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical. * * *"

The special dissent of Mr. Justice Rutledge, at page 352, quoted hereafter, further emphasizes what Professor Lockhart would consider the "formal dogma" of the majority of the Court in *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944).

On May 15, 1944, the same date of the decision in the case of *McLeod v. Dilworth Co.*, 322 U.S. 327, Mr. Justice Frankfurter also rendered the opinion of six members of the court in *General Trading Co. v. State Tax Commission of the State of Iowa*, 322 U.S. 335 (1944), where a "use" tax was upheld by the majority of this court. There appears to be no difference in the facts of this case and those in the case of *McLeod v. Dilworth Co.* ,except that the Iowa tax was a "use" tax and the Arkansas tax was a "sales" tax. In his opinion in *General Trading Co. v. Tax Commission*, Mr. Justice Frankfurter, in upholding the "use" tax, was careful to say, "of course, no state can tax the privilege of doing interstate business" (p. 338). Mr. Justice Rutledge wrote a special concurring opinion. Mr. Justice Jackson and Mr. Justice Roberts dissented on the ground that the tax was upon interstate commerce.

On the same date a third case was decided by this Court, *International Harvester Co. v. Dept. of Treasury*, 322 U.S. 340 (1944). The last case involved an

Indiana tax upon gross income applied to receipts from certain classes of sales which seven members of the court concluded were local sales, and so subject to tax. Mr. Justice Douglas wrote the majority opinion upholding the imposition of the tax in which five Justices concurred. The impact of Professor Lockhart's Article upon Mr. Justice Douglas is illustrated by his citation of same as authority for the following language which we quote again from his majority opinion:

> "Indeed, if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363), we must acknowledge that the sales tax sustained in the *Berwind-White* case 'was, in form, imposed upon the gross receipts from an interstate sale.' * * *"

Mr. Justice Roberts took no part in the decision and Mr. Justice Jackson dissented.

Mr. Justice Rutledge, by a special opinion concurred in *General Trading Co. v. Tax Commission*, and *International Harvester Co. v. Dept. of Treasury*, but dissented vigorously from *McLeod v. Dilworth Co.*, emphasizing that the mere fact that Iowa classed her tax as a "use" tax and Arkansas described her tax as a "sales" tax was no ground for a different constitutional result.

> "The only other difference is in the terms used by Iowa and Arkansas, respectively, to describe their taxes. For reasons of her own Arkansas describes her tax as a 'sales tax.' Iowa calls hers a 'use tax.' This court now is committed to the

validity of 'use' taxes. * * * Other things being the same, constitutionality should not turn on whether one name or the other is applied by the state. * * *" (p. 352)

The dissenting opinions of Mr. Justice Douglas and Mr. Justice Rutledge in the above cases might be commented on briefly at this point.

The case of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33 (1940), heavily relied upon by Mr. Justice Douglas in his dissent to *McLeod v. Dilworth*, at page 332, should not affect the instant case. As Professor Lockhart, on page 87 of his Article, frankly admits the Supreme Court had never before directly ruled against the constitutionality of the particular application of the sales tax there involved. In other words, there was no fixed rule by this Court on the subject of the application of such a tax to the transactions there involved. The general trend, only, in court decisions was thought to be against the validity of the tax. *Stare decisis* was not *directly* involved The Court was more or less free to make a new rule to fit a new application of a relatively new type of tax. There were many persuasive reasons for upholding the tax in that case including the prejudice the Court felt which might result to local business from a denial of the same. Such considerations are wholly absent here (See Professor Lockhart's Article, p. 69, note 138). The taxation of interstate and foreign transportation and communication may very well fall within another category. The incidents of the two phases of commerce are very different. The majority opinion of Mr. Chief Justice Stone in the *Berwind-*

White case clearly recognized the distinction between the tax there involved and the one involved in the *Puget Sound* case by the following language supporting the condemnation of the application of certain types of tax including the one here involved to certain activities:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the *privilege of doing it*, or *tax interstate transportation or communication or their gross earnings*, or levy an exaction on merchandise in the court of its interstate journey. * * *" (Emphasis ours) (p. 48).

The views of Mr. Justice Douglas in the earlier case of *Nelson v. Sears, Roebuck & Co.*, 312 U.S. 359, 363 (1941), should likewise be considered, where he said:

> "In passing on the constitutionality of a tax law 'we are concerned only with its practical operation, not its *definition* or the precise form of *descriptive* words which may be applied to it.' * * *" (Emphasis ours).

While the constitutionality of a tax is of course determined by this Court, it will defer to the determination of the state courts as to the meaning and application of the law.

Storaasli v. Minnesota, 283 U.S. 57, 62 (1931);

Illinois Central R. R. Co. v. Minnesota, 309 U.S. 157, 165 (1940).

The meaning and application of the business and occupation tax of the State of Washington involved in the *Puget Sound* case is well settled by both state and federal decisions. It is an excise or occupation tax imposed upon the privilege of doing business within the state. The tax is imposed for revenue, not for regulation. It is measured by and imposed upon gross receipts derived from the doing of business.

State ex rel. Stiner v. Yelle, 174 Wash. 402, 25 P.(2d) 91;

Supply Laundry v. Jenner, 178 Wash. 72, 34 P.(2d) 363;

Pacific Tel. & Tel. Co. v. Tax Commission, 183 Wash. 697, 48 P.(2d) 938, affirmed 297 U.S. 403;

Fisher's Blend Station v. Tax Commission, 182 Wash. 163, 45 P.(2d) 942, reversed 297 U.S. 650;

Paramount v. Henneford, 184 Wash. 376, 51 P.(2d) 385, cert. den., 298 U.S. 665;

Puget Sound Stevedoring Co. v. Tax Commission, 189 Wash. 131, 63 P.(2d) 532, 302 U.S. 90.

It must be admitted that the views of Mr. Justice Douglas and Mr. Justice Rutledge in these three cases follow, to some extent at least, the prophesies of Professor Lockhart in his Article. The decisions of the majority do not.

FORMALISM, PRACTICALITY AND PRAGMATISM

Professor Lockhart, in his Article, repeatedly decries what he terms "formalism" or "formal distinctions" in determining the constitutional effect of taxes

(pp. 42, 50, 51, 52, 58, 59, 63, 69, 90, 91, 92, 93, 94). He repeatedly refers to what he believes to be the trend towards a "practical" approach by this Court to the subject (pp. 42, 51, 67, 85). He discusses and forecasts an increasing so-called "pragmatic" approach of this Court to the subject of the constitutionality of the taxes here discussed (pp. 42, 50, 63, 79, 85). The word "pragmatic" is thus defined in Webster's New International Dictionary:

> "* * * busy, active, skilled in business, especially in law and state affairs; * * * practical; matter-of-fact. Dealing with practical values or consequences."

The majority of the court in the case of *McLeod v. Dilworth Co.*, 322 U.S. 327 (1944) supported what Professor Lockhart would consider a "formal" distinction. The minority of the court vigorously pointed out this lapse from what they believed to be the course of the court reflected in the *Berwind-White* case. While "formal" distinctions may sometimes be unfortunate, this is by no means true in the case of taxes. Taxes are necessarily formal. They must be created in specific terms by legislative bodies. Some activities are taxed, some are not. But so long as the classification is real the courts will not disturb what may in many cases prove to be a rather unwarranted distinction. As in the case of legislative bodies which are often forced to make somewhat arbitrary rules of taxation, so in the case of this Court, the line of constitutionality of taxes, as Mr. Justice Frankfurter says, is "none the worse for being narrow." The distinction made by legislative bodies between taxpayers

sometimes appears to be arbitrary. The distinctions made by this Court, to whom the duty of protecting interstate and foreign commerce from undue burdens has been granted, to some may appear equally arbitrary. If all state taxes upon interstate and foreign commerce were held by this Court to be constitutional, that commerce which under the protection of this Court has made the Nation great, would be seriously crippled.

The most "practical" and "pragmatic" approach to the subject of taxes, in the interest of state taxing bodies and those "skilled in business" or "in law," is for the Court to establish clear rules of what can and what cannot be constitutionally taxed. Within the rules so laid down legislative bodies may pass and administer the laws thus permitted. Business men and lawyers may know in advance that a certain tax is constitutionally valid; that another is not. Of course, from time to time a new type of tax may develop and its application to a particular state of facts must necessarily come before this court and its decision will have to be sought. In the *Puget Sound* case, however, the constitutionality of the tax as applied to transportation or communication in interstate or foreign commerce had been condemned for fifty years. There is no practical reason for its change and a long historically well-founded reason for its continuance. The principle of *stare decisis* is not only well settled, but extremely wise.

THE STATE OF WASHINGTON HAS BROAD POWERS OF TAXATION OVER THE OPERATIONS OF THE PUGET SOUND COMPANY

In its protection of interstate and foreign transportation and communication this Court has left the states broad powers of taxation. The personal and real property of Puget Sound is of course subject to an ad valorem property tax.

Old Dominion S.S. Co. v. Virginia, 198 U.S. 299 (1905);

Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944).

The Puget Sound Company could be taxed for the privilege of exercising its corporate franchise within the State by a non-discriminatory tax measured on the net income justly attributable to its business done within the State although part of its income so attributed is from interstate and foreign commerce.

Matson Navigation Co. v. State Board, 297 U.S. 441 (1936).

The Puget Sound Company, if a foreign corporation, might be taxed for the privilege of conducting whatever local business it might do by a non-discriminatory tax measured, in part at least, by gross receipts from interstate commerce.

Maine v. Grand Truck, 142 U.S. 217 (1891);

Ficklen v. Shelby County Taxing District, 145 U.S. 1 (1892);

Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379 (1903);

American Manufacturing Co. v. St. Louis, 250 U.S. 459 (1919).

See also

Ford v. Beauchamp, 308 U.S. 331 (1939).

The State of Washington may impose a gross receipts tax on Puget Sound based in part on receipts from interstate and foreign commerce if such a tax is in lieu of all other taxes.

U. S. Express Co. v. Minnesota, 223 U.S. 335 (1912);

Cudahy Packing Co. v. Minnesota, 246 U.S. 450 (1918);

Pullman Co. v. Richardson, 261 U.S. 330 (1923);

Great Northern Ry. Co. v. Minnesota, 278 U.S. 503 (1929);

Illinois Central R.R. v. Minnesota, 309 U.S. 157 (1940).

Professor Lockhart in his Article, at page 83, admits quite frankly that the same result sought to be achieved by a reversal of the *Puget Sound* case could now be attained by another form of tax. He says:

> "Taxes measured by gross receipts *can readily be drafted* which will void the practical difficulties considered above." (Emphasis ours)

His argument is that if gross receipts from interstate and foreign transportation and communication can be reached by another type of taxes it is purely "formal" for the court to forbid such receipts to be reached by a tax such as that now under consideration. To this court has been entrusted the duty of declaring the constitutional limits on taxes. As indicated, it has marked the boundaries between such taxes. If there are to be no boundaries or if the boundaries are

not to be enforced confusion will result to all concerned. Carrying Professor Lockhart's argument to a final conclusion would be like saying that while the legislature of a state did not happen to include certain property or activities within a tax, they could have done so, and therefore the tax should apply. Many other illustrations can be cited of valid state taxes imposed indirectly upon interstate and foreign transportation and communication.

CHANGE IN THE RULES SHOULD COME FROM CONGRESS

Where this Court has forbidden for many years as a burden on interstate and foreign transportation and communication a certain tax or form of tax, in the interests of certainty that rule should be continued. If in the light of changed conditions such a rule constitutes an undue prohibition upon the activities of the state, and if the imposition of such a tax, in the opinion of Congress, would not cause an undue burden upon interstate and foreign transportation and communication, Congress can undoubtedly change the rule made by this Court.

International Shoe Co. v. State of Washington, 66 Sup. Ct. 154, 158 (1945) ..... U.S. .....:

> "It is no longer debatable that Congress, in the exercise of the commerce power, may authorize the states, in specific ways, to regulate interstate commerce or impose burdens upon it."

Until Congress acts, however, the following language from the opinion of Mr. Chief Justice Stone in *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S.

434 (1939) is believed to be sound and peculiarly applicable:

> "For more than a century, since *Brown v. Maryland*, 12 Wheat. 419, 445, it has been recognized that under the commerce clause, Congress not acting, some protection is afforded to interstate commerce against state taxation of the privilege of engaging in it. * * * For *half a century*, following the decision in *Philadelphia & Southern S.S. Co. v. Pennsylvania*, 122 U.S. 326; *it has not been doubted that state taxation of local participation* in interstate commerce, measured *by the entire volume of the commerce, is likewise foreclosed.* During that period Congress has not seen fit to exercise its constitutional power to alter or abolish the rules thus judicially established. Instead, it has left them undisturbed, doubtless because it has appreciated the destructive consequences to the commerce of the nation if their protection were withdrawn. Meanwhile Congress has accommodated its legislation, as have the states, to these rules as an established feature of our constitutional system. There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it. See *Western Live Stock v. Bureau of Revenue*, *supra*, 254, *et seq.*, and cases cited."

We cannot believe that the majority of the Court intended by any decision so far rendered to destroy or undermine the doctrine underlined in the foregoing quotation, either directly, or by erosion, as Professor Lockhart suggests on pages 76 and 77 of his Article.

CONCLUSION

Amicus curiae trusts that the ideas incorporated in this brief will be of some assistance to the court. These ideas may be summarized as follows:

1. The unanimous decision of this Court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), has never been modified or reversed. It has been distinguished but has never been disapproved or its holding questioned by a majority of the Court. It is supported by a "long" and "unbroken" line of decisions of this Court.

2. No decision of this Court since the *Puget Sound* case has ever held that gross receipts directly derived from interstate transportation and communication may be taxed by a state.

3. The case of *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) merely represented the desire of this Court to avoid a constitutional ban on phases of commerce somewhat remotely connected with commerce itself.

4. The wide latitude granted to states by this Court to impose "use" taxes has been influenced by many factors such as the prejudice another rule might create between interstate and intra-state commerce. No such prejudice is here involved.

5. The danger of a cumulative tax is just as great whether such a tax be created in the same state or in another state. Such a cumulative tax in the same state exists in the State of Washington.

6. In the absence of Congressional action this Court must necessarily fix the rules as to what con-

stitutes an undue burden on interstate and foreign commerce. Unless such rules are fixed and rigid, state taxing bodies, the public, and lawyers have no rules by which to guide their actions.

7. If some rule of this Court in the protection of interstate and foreign commerce is believed to be too restrictive Congress may always be asked to modify the rule. Where the rule has been "long" and "unbroken" Congressional action is a better method of change than a sudden change by the Court itself.

Respectfully submitted,

GROSSCUP, AMBLER & STEPHAN,
JOHN AMBLER,
BEN C. GROSSCUP,
ALBERT E. STEPHAN,
Attorneys for Amicus Curiae.

Address:
807 Central Building,
Seattle 4, Washington.

APPENDIX I

State of Washington Business and Occupation Tax

Chapter 180, Laws of Washington, 1935, as amended by Chapter 156, Laws of Washington, 1943; Remington's Revised Statutes §8370-4.

"* * * From and after the first day of May, 1935, there is hereby levied and there shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be, as follows:

* * * * * * * * * * *

"(g) Upon every person engaging within this state in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d), (e) and (f) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-half of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to materials used in the performance of such businesses passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service which does not constitute a 'sale at retail' or a 'sale at wholesale' as defined herein."

Chapter 180, Laws of Washington, 1935, as amended by Chapter 249, Laws of Washington, 1945; Remington's Revised Statutes §8370-5:

"* * * For the purposes of this title, unless otherwise required by the context:

* * * * * * * * * * *

"(g) The term 'gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends, and other emoluments however designated all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses; * * *"

Chapter 180, Laws of Washington, 1935, as amended by Chapter 249, Laws of Washington, 1945; Remington's Revised Statutes §8370-12:

"* * * In computing tax there may be deducted from the measure of tax the following items:

* * * * * * * * * * *

"(f) Amounts derived from business which the State of Washington is prohibited from taxing under the constitution of this state or the constitution or laws of the United States;

* * * * * * * * * * *"

Chapter 180, Laws of Washington, 1935, as amended by Chapter 178, Laws of Washington, 1941; Remington's Revised Statutes §8370-187:

"* * * If any person shall engage in any business or perform any act for which a tax is imposed by this act, he shall, whether taxable or not, under such rules and regulations as the Commis-

sion shall prescribe, apply for and obtain from the Commission, upon payment of a fee of one dollar, a registration certificate. Said registration certificate shall be personal and not transferable and shall be valid as long as the taxpayer shall continue in business and pay the tax accrued to the state under the provisions of this act. In case business is transacted at two or more separate places by one taxpayer, a separate registration certificate for each place at which business is transacted with the public shall be required, but, for such additional certificates no fee shall be required. Each certificate shall be numbered and shall show the name, residence and place and character of business of the taxpayer and such other information as the Tax Commission shall deem necessary and shall be posted in a conspicuous place at the place of business for which it is issued. Where a place of business of the taxpayer is changed, the taxpayer must return to the Tax Commission the existing certificate, and a new certificate will be issued for the new place of business free of charge. No person shall engage in any business taxable hereunder without being registered in compliance with the provisions of this section: * * *."

APPENDIX II

Seattle Business Tax Ordinance

"Ordinance No. 72630

"An Ordinance relating to and providing for a license or occupation tax upon certain businesses, occupations, pursuits and privileges; defining offenses and prescribing penalties.

"BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

"Section 1: EXERCISE OF REVENUE LICENSE

POWER: The provisions of this ordinance shall be deemed an exercise of the power of The City of Seattle to license for revenue."

This Ordinance, approved June 4, 1943, was amended by Ordinance No. 73023, approved December 29, 1943, and by Ordinance No. 73335, approved June 8, 1944, and now provides in part as follows:

"Section 2. DEFINITIONS: In construing the provisions of this ordinance, save when otherwise declared or clearly apparent from the context, the following definitions shall be applied:

* * * * * * * * * *

"(e) The term 'gross income of the business' means the value proceeding or accruing by reason of the transaction of the business engaged in and includes gross proceeds of sales, compensation for the rendition of services, gains realized from trading in stocks, bonds or other evidences of indebtedness, interest, discount, rents, royalties, fees, commissions, dividends and other emoluments however designated, all without any deduction on account of the cost of tangible property sold, the cost of materials used, labor costs, interest, discount, delivery costs, taxes or any other expense whatsoever paid or accrued and without any deduction on account of losses.

* * * * * * * * * *

"Section 3. ENUMERATION OF PERSONS SUBJECT TO TAX—AMOUNT: On and after the first day of July, 1943, if this ordinance is then in effect, otherwise on and after the effective date of this ordinance, there is hereby levied upon and shall be collected from and paid as hereinafter provided by every person on account and for the

privilege of engaging in business activities, a license fee or occupation tax, sometimes herein referred to as the 'tax,' in amounts to be determined by application of rates given against value of products, gross proceeds of sale, or gross income of business, as the case may be, for the two calendar months next preceding the beginning of each bi-monthly period, as follows:

* * * * * * * * * *

"(f) Upon every person engaging within this City in any business activity other than or in addition to those enumerated in subsections (a), (b), (c), (d) and (e) above; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one-tenth of one per cent. This subsection includes, among others, and without limiting the scope hereof (whether or not title to material used in the performance of such business passes to another by accession, confusion or other than by outright sale), persons engaged in the business of rendering any type of service.

* * * * * * * * * *

"Section 10. DEDUCTIONS ALLOWED IN COMPUTING LICENSE FEES: In computing the license fee or tax there may be deducted from the measure of tax the following items

* * * * * * * * * *

"(e) Amounts derived from business which the City is prohibited from taxing under the constitution or laws of the State or the constitution or laws of the United States, and any amounts collected by the taxpayer as an excise tax .

* * * * * * * * * *

"Section 12. BUSINESS LICENSE REQUIRED: On

and after the first day of July, 1943, if this ordinance is then in effect, otherwise on and after the effective date of this ordinance, no person, whether subject to the payment of a tax or not, shall engage in any business or activity in The City of Seattle for which a license fee or tax is imposed by this ordinance without having first obtained and being the holder of a valid and subsisting license so to do, to be known as a 'Business License,' issued under the provisions of this ordinance, as hereinafter provided, and without paying the license fee or tax imposed by this ordinance. The fee or tax for the 'Business License' shall be the license fee or tax imposed by this ordinance in addition to the sum of One Dollar ($1.00), which shall accompany the application for the license. The license herein provided for shall expire at the end of the calendar year in which it is issued, and a new license shall be required for each calendar year. Applications for the license shall be made to and issued by the Comptroller on forms provided by him."

CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945 46

No. 519 30

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, AND ALMERINDO PORTFOLIO, TREASURER OF THE CITY OF NEW YORK, PETITIONERS,

vs.

JOHN T. CLARK & SON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED OCTOBER 17, 1945.

CERTIORARI GRANTED NOVEMBER 19, 1945.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 519

JOSEPH D. McGOLDRICK, COMPTROLLER OF THE CITY OF NEW YORK, AND ALMERINDO PORTFOLIO, TREASURER OF THE CITY OF NEW YORK, PETITIONERS,

vs.

JOHN T. CLARK & SON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

	Original	Print
Record on appeal to Court of Appeals of New York	1	1
Statement under Rule 234	1	1
Order transferring proceeding to Appellate Division	2	1
Notice of application for order transferring proceeding	4	3
Petition	6	4
Answer	13	8
Return of Deputy Comptroller	18	12
Final determination of Comptroller	21	14
Minutes of hearing of February 1, 1943, before Office of Comptroller	22	15
Caption and appearances	22	15
Opening statement for taxpayer	23	15
Testimony of George J. Clark	27	19
Minutes of hearing of March 2, 1943, before Office of Comptroller	34	24
Testimony of George J. Clark (recalled)	34	24

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 13, 1945.

Record on appeal to Court of Appeals of New York—Continued	Original	Print
Minutes of hearing of April 5, 1943, before Office of Comptroller	69	51
Testimony of David Joseph	71	52
Minutes of hearing of June 8, 1943, before Office of Comptroller	74	55
Testimony of George J. Clark (recalled)	74	55
Taxpayer's Exhibits:		
1—Tax return for year 1938	86	64
2—Tax return for year 1939	90	66
3—Tax return for year 1940	94	68
4—Tax return for year 1941	98	70
5—Applications for refund of tax for the years 1938, 1939 and 1940 together with letter from taxpayer's counsel	102	73
6—Application for refund of tax for the year 1941 together with letter from taxpayer's counsel	116	81
7 for Identification—Photostatic copy of loading plan	122	84
8 for Identification—Memorandum of agreement dated January 29, 1940 between taxpayer and Cunard White Star Steamship Co., Ltd.	123	85
9—Memorandum of agreement effective July 1, 1939 between taxpayer and Ellerman and Bucknall Steamship Company, Limited	128	89
10—Agreement dated November 15, 1940, between taxpayer and Munargo Line Company	135	93
11—Booklet entitled "Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association"	143	99
12—Photostatic copy of a loading plan	174	120
Affidavit of no opinion	175	121
Stipulation waiving certification	176	121
Notice of appeal to the Court of Appeals	177	122
Order of the Appellate Division	179	123
Memorandum opinion of the Appellate Division	181	124
Waiver of certification	181	124
Remittitur of Court of Appeals	182	125
Order on remittitur	185	126
Affidavit of regularity	187	127
Judgment on remittitur	189	128
Affidavit of no opinion by Court of Appeals	191	129
Clerk's certificate (omitted in printing)	192	
Order allowing certiorari	193	130

[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Application of JOHN T. CLARK & SON, Petitioner, for an Order Against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

STATEMENT UNDER RULE 234

This is a proceeding brought pursuant to Article 78 of the Civil Practice Act to obtain a refund of certain taxes, measured by petitioner's gross receipts paid by petitioner under protest to the City of New York, for the years 1938 to 1941, inclusive.

It was commenced on January 27, 1944 by the service of petition and notice of application on Joseph D. McGoldrick and Almerindo Portfolio, Comptroller and Treasurer, respectively, of the City of New York.

The respondents answered the petition on April 19, 1944.

There has been no change in the parties or attorneys herein.

[fol. 2] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART I

Present—Hon. Aaron J. Levy, Justice.

In the Matter of the Application of JOHN T. CLARK & SON, Petitioner, for an Order Against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Pursuant to Article 78 of the Civil Practice Act

ORDER TRANSFERRING PROCEEDING TO APPELLATE DIVISION—May 3, 1944

The petitioner, John T. Clark & Son, having duly moved this Court for an order, among other things, transferring these proceedings for disposition to the Appellate Division

of the Supreme Court, First Judicial Department, and said motion having regularly come on to be heard,

[fol. 3] Now, upon reading and filing the notice of motion and the petition of John T. Clark & Son, verified the 27th day of January, 1944, together with proof of service of a copy of said papers upon respondents, submitted by petitioner in support of said motion, and upon reading and filing the answer to said petition, verified the 19th day of April, 1944, and the return, dated the 19th day of April, 1944, submitted by respondents in opposition thereto, and after hearing Baldwin, Todd & Lefferts, James F. Hogan, Esq., of counsel, attorneys for petitioner, in support of said motion, and Ignatius M. Wilkinson, Esq., Corporation Counsel, Samuel J. Warms, Esq., of counsel, attorney for respondents, consenting to the granting of said motion to the extent hereinaffer provided, and due deliberation having been had thereon,

Now, on motion of Baldwin, Todd & Lefferts, attorneys for petitioner, it is upon filing the opinion of the Court

Ordered, that said application be and the same hereby is granted to the extent of directing that the proceeding initiated by the petition of John T. Clark & Son, verified the 27th day of January, 1944, be transferred for disposition to a Term of the Appellate Division of the Supreme Court to be held in and for the First Judicial Department, and that all questions relating to a review of the determination of respondent Joseph D. McGoldrick, as Comptroller of the City of New York, and to the refund to petitioner of the sum of $4,942.37, be referred to said Appellate Division for disposition, and it is further

[fol. 4] Ordered, that a complete printed record of the proceedings before the respondent Joseph D. McGoldrick, as Comptroller of the City of New York, and of the proceedings upon this application be filed in said Appellate Division in accordance with its rules, in order that it may review the matters at issue herein in accordance with Section 1296 of the Civil Practice Act.

Enter,

A. J. L., J. S. C.

In Supreme Court of New York, County of New York

[Same Title]

Notice of Application

Please Take Notice that on the annexed petition of John T. Clark & Son, verified January 27th, 1944, the undersigned, pursuant to Article 78 of the Civil Practice Act, will move this Court at a Special Term, Part I thereof, to be held in and for the County of New York at the County Courthouse, Foley Square, New York, New York, on the 4th day of February, 1944, at 10 A. M. in the forenoon of that day or as soon thereafter as counsel can be heard:

(1) For an order by this Court transmitting the complete record of this proceeding to the Appellate Division, First Department, for a review of the determination of respondent, Joseph D. McGoldrick, Comp-
[fol. 5] troller of the City of New York, referred to in the aforesaid petition, or

(2) in the alternative, for an order by this Court annulling or correcting said determination and directing the refund with interest of the sum of $4,942.37 paid under protest by petitioner to the City Collector of New York City and granting petitioner such other and further relief as may be just.

Please Take Further Notice that, pursuant to Section 1291 of the Civil Practice Act, you are required to serve at least two days prior to the return day of this motion a verified answer, annexing thereto a certified transcript of the record of proceedings subject to review or consideration and any and all affidavits or other written proof to be used herein.

Yours, etc., Baldwin, Todd & Lefferts, Attorneys for Petitioner, Office and Post Office Address, 120 Broadway, Borough of Manhattan, City of New York.

To: Joseph D. McGoldrick, Esq., Comptroller of the City of New York, Municipal Building, New York, New York. Almerindo Portfolio, Esq., Treasurer of the City of New York, Municipal Building, New York, New York.

[fol. 6] In Supreme Court of New York, County of New York

[Same Title]

Petition

To the Supreme Cout of the State of New York:

The petition of John T. Clark & Son respectfully shows to the Court and alleges:

1. At all times herein referred to, petitioner was, and is now, a corporation organized under the laws of the State of New York, with an office or place of business at 17 State Street, New York, New York, engaged in the general stevedoring business, as hereinafter described.

2. At all times herein referred to, respondent, Joseph D. McGoldrick, was, and is now, the Comptroller of the City of New York, and respondent, Almerindo Portfolio, was, and is now, the Treasurer of the City of New York.

3. Pursuant to Chapter 873 of the Laws of 1934, the Council of the City of New York adopted the following Local Laws:

Local Law No. 20 of 1938, effective June 30, 1938.
Local Law No. 103 of 1939, effective June 28, 1939.
Local Law No. 78 of 1940, effective June 29, 1940.
Local Law No. 47 of 1941, effective June 30, 1941.

4. Each of said Local Laws imposed a tax, measured by [fol. 7] gross receipts, for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business or commercial activity.

5. On or about June 16, 1941, petitioner filed with the Collector of the City of New York returns on its entire gross receipts for the calendar years 1938, 1939, and 1940, pursuant to the first three of said Local Laws, which purported to show due, and petitioner paid at the time of filing, the following amounts:

For 1938	
Tax due	$879.94
Interest June 15, 1939 to June 15, 1941	105.59
Total Tax and Interest	$985.53

For 1939

Tax due	$1,109.22
Interest June 15, 1939 to June 15, 1941	66.55
Total Tax and Interest	$1,175.77

For 1940

Tax due (no interest)	$1,434.48

Said returns were filed and said taxes and amounts of interest were paid under protest and duress and to avoid the imposition of penalties. Annexed to each of said returns was a letter which stated in detail the grounds of protest.

6. On or about June 11, 1942, petitioner filed with the Comptroller applications for the refund of said taxes and [fol. 8] interest. Said applications were rejected by the Comptroller by letter dated July 24, 1942, but the matter was set down for hearing.

7. On or about June 12, 1942, petitioner filed with the Collector of the City of New York a return on its entire gross receipts for the calendar year 1941, pursuant to the fourth of said Local Laws, which purported to show due, and petitioner paid at the time of filing, a tax of $1,346.59. Said return was filed and said tax was paid under protest and duress and to avoid the imposition of penalties. Annexed to said return was a letter which stated in detail the grounds of protest.

8. On or about November 27, 1942, petitioner filed with the Comptroller an application for the refund of said tax, and, in response, received a letter from the Comptroller, dated November 23, 1942, referring the matter for hearing.

9. Thereafter, at hearings held before a Presiding Officer representing the Comptroller on February 1, March 2, April 5 and June 8, 1943, petitioner adduced testimony and evidence and thereafter submitted a memorandum of law in support of the aforementioned applications. No testimony, evidence or memorandum was offered or submitted by the Comptroller.

10. By letter dated December 30, 1943, the Comptroller denied all four of said applications. There was no proof,

competent or otherwise, of facts to support said determination.

[fol. 9] 11. The general stevedoring business as carried on by petitioner during the calendar years 1938-1941, inclusive, may be briefly described as follows:

(a) Four basic operations were involved:

(1) loading steamships;

(2) unloading steamships;

(3) loading freight cars;

(4) unloading freight cars.

(b) The first two basic operations were carried out at piers located within and without the City of New York.

(c) The last two basic operations were carried out only at piers located within the City of Hoboken, New Jersey.

(d) In loading a steamship, petitioner would remove the hatches, prepare the holds, rig the hoisting gear and then transfer the freight from pier or lighter and stow it in the holds or on deck.

(e) In unloading a steamship, petitioner would reverse the process just described.

(f) In loading a freight car petitioner would transfer the freight from the pier and stow it in or on the car.

(g) In unloading a freight car, petitioner would reverse the process just described.

(h) The four basic operations constituted direct but intermediate links in the movement of freight from shipper to consignee.

[fol. 10] (i) During the performance of the four basic operations petitioner assumed responsibility for all damage to or loss of freight, injury to its own employees, and to third persons, and damage to the ship or freight car.

(j) The cost of the first two basic operations was usually included in the published tariffs of the steamship company. The cost of the last two basic operations was always included in the published tariff of the railroad company.

(k) Stevedores working in the Port of Greater New York and vicinity are subject to two distinct wage scales: one for coastwise shipping (from the Port of New York to another port within the United States or vice versa) and one for deep sea shipping (from the Port of New York to a foreign port or vice versa). The deep sea rate is higher than the coastwise rate. All wages paid by petitioner were paid at the deep sea rate.

(l) All freight loaded or unloaded by petitioner in New York City was en route to or from a foreign port, with the exception of one or two summer cargoes of beer for Miami, Florida. Most of the freight was loaded into or unloaded from ships sailing under foreign flags.

(m) All freight loaded or unloaded by petitioner on the New Jersey shore was likewise en route to or from a foreign port, except for cargoes carried by ships of Seatrain Lines, Inc., which sailed from Hoboken, [fol. 11] New Jersey, to New Orleans, Louisiana, and thence to Havana, Cuba, returning again to Hoboken via New Orleans. Most of the freight was loaded into or unloaded from ships sailing under foreign flags.

12. The refusal of the Comptroller to grant petitioner's applications for refund was unjust, erroneous and contrary to law for the following reasons, among others:

(1) The Enabling Act, Chapter 873, Laws of 1934, as amended, pursuant to which the Local Laws were enacted, did not authorize the City of New York to levy a tax upon the gross receipts received by the taxpayer for the services described in the foregoing paragraph.

(2) If the Enabling Act, as amended, purported to authorize the imposition of the tax, said law, and the Local Laws, pursuant to which the tax was levied and collected, are unconstitutional and invalid for the following reasons:

(a) Said laws are unconstitutional and in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

(b) Said laws are unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) Said laws are unconstitutional and in violation of Article I, Section 10, Clause 2, of the Constitution of the United States.

[fol. 12] (3) Said laws are unconstitutional and invalid as an unlawful interference with the paramount power of Congress over navigation upon the navigable waters of the United States.

13. Heretofore and on the 27th day of January, 1944, petitioner filed with the Comptroller an undertaking in the sum of $500 executed by American Surety Company and approved by a Justice of the Supreme Court to the effect that, if this proceeding be dismissed or the determination confirmed, petitioner will pay all costs and charges which may accrue in its prosecution.

14. No previous application for the relief sought herein has been made.

Wherefore, petitioner prays (1) for an order by this Court transmitting the complete record of this proceeding to the Appellate Division, First Department, for a review of the determination of respondent, Joseph D. McGoldrick, Comptroller of the City of New York, referred to in the aforesaid petition, or (2) in the alternative, for an order by this Court annulling or correcting said determination and directing the refund with interest of the sum of $4,942.37 paid under protest by petitioner to the City Collector of New York City and granting petitioner such other and further relief as may be just.

John T. Clark & Son, by D. H. McKetrick.

(Verified by D. H. McKetrick, January 27, 1944.)

[fol. 13] In Supreme Court of New York, County of New York

(Same title)

Answer

The respondents, by Ignatius M. Wilkinson, Corporation Counsel of the City of New York, their attorney, for their

verified answer to the petition herein, upon information and belief, respectfully:

1. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "5", but respectfully refer to the transcript of the record of the proceedings had before the Comptroller of the City of New York for the evidence produced by the petitioner relating to the said allegations of the petition, and for the legal effect thereof, except that they admit that the petitioner filed returns with the Collector of the City of New York, based upon its gross receipts or gross income for the years 1938, 1939 and 1940, and paid the aggregate amount of $3,525.68 on account of the taxes and interest due for the said years, under protest, and except that they deny that the said payment was made under duress.

2. Deny the allegations contained in the paragraph of the petition numbered "9," except that they admit that hearings were held before the Comptroller on February 1, March 2, April 5 and June 8, 1943, at which evidence was offered in connection with the petitioner's applications.

3. Deny the allegations contained in the paragraph of the petition numbered "10," except that they admit that on [fol. 14] December 30, 1943, the Comptroller gave to the petitioner notice of his determination denying the petitioner's applications for refunds.

4. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the petition numbered "1" and "11," but the respondents respectfully refer to the transcript of the record of the proceedings and of the testimony taken before the Comptroller for the evidence relating to the petitioner's manner of conducting its business, and for the legal effect thereof.

5. Deny the allegations contained in the paragraph of the petition numbered "12."

6. Deny that they have any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraph of the petition numbered "7," except that they admit that the petitioner filed a return

based upon its gross receipts or gross income for the year 1941, with the Collector of the City of New York, and paid the sum of $1,346.59 as the tax appearing due thereon, under protest, and except that they deny that the said payment was made under duress, but respectfully refer to the transcript of the record of the proceedings had before the Comptroller of the City of New York for the evidence pertaining to the said allegations, and for the legal effect thereof.

[fol. 15] As and for a statement of the grounds upon which the Comptroller acted in making the determination complained of, the respondents further allege, on information and belief:

7. That between July 1, 1938 and June 30, 1942, the petitioner was engaged in and carried on within the City of New York, a business as defined in the local laws here in question, for gain and profit. By virtue of the fact that the petitioner was engaged in business as aforesaid in the City of New York, it became subject to the tax measured by its gross receipts or income, imposed by Local Laws Nos. 20 of 1938, 103 of 1939, 78 of 1940 and 47 of 1941.

8. That on or about June 14, 1941, the petitioner filed with the Collector of the City of New York its returns of excise tax measured by said gross receipts for the calendar years, 1938, 1939 and 1940, together with written notice of protest, dated of even date therewith, filed with the said returns, and paid the amount of taxes appearing due thereon, amounting in the aggregate, with penalties and/or interest to $3,595.68, and on or about June 12, 1942, the petitioner filed with the Collector of the City of New York its return of excise tax measured by gross receipts for the calendar year 1941, and paid the tax appearing due thereon, amounting to $1,346.59, under protest.

9. That said taxes, together with penalties and/or interest, were paid pursuant to Local Laws Nos. 20 of 1938, 103 of 1939, 78 of 1940 and 47 of 1941, for the annual [fol. 16] privilege periods embraced within the period from July 1, 1938 to June 30, 1942, and covered the annual calendar measuring periods comprised within the period from January 1, 1938 to December 31, 1941, inclusive.

10. That on or about June 11, 1942, the petitioner filed with the Comptroller of the City of New York its application for a refund of the said taxes applicable to the calendar years 1938, 1939 and 1940; and on or about November 7, 1942, the petitioner filed with the Comptroller of the City of New York, its application for refund of the taxes paid by it for the calendar year 1941, together with a demand for a hearing thereon.

11. That thereafter and on February 1, March 2, April 5 and June 8, 1943, hearings were duly held before the Comptroller of the City of New York on the said applications for refunds, pursuant to the provisions of the local laws in question.

12. That thereafter and on or about December 30, 1943, the Comptroller of the City of New York made a final determination denying the petitioner's applications for refunds of the said taxes.

13. That annexed hereto and made part of this answer is a duly certified transcript of the record of the proceedings had before the Comptroller, mentioned in the petition herein, and subject to review or consideration in this proceeding.

14. That the evidentiary facts upon which the determination of the respondent, the Comptroller of the City of New [fol. 17] York, was based, are set forth and contained in the certified transcript of the record of the proceedings, the minutes of the testimony taken at the hearings, the written documents introduced in evidence at the hearings and all the correspondence and other documents relating to and supporting the determination of the said respondent, the Comptroller of the City of New York. The said evidentiary facts show that there was competent proof of all the facts necessary to be proved in order to authorize the making of the determination by the said respondent.

15 That the determination of the respondent, the Comptroller of the City of New York, complained of by the petitioner in this proceeding, is in conformity with the law and the facts contained in the aforesaid record of the proceedings had before the Comptroller, annexed hereto and made a part hereof.

16. That this proceeding requires the determination of questions relating to the sufficiency and weight of evidence submitted to the Comptroller, within the purview of subdivisions 6 and 7 of Section 1296 of the Civil Practice Act, and hence, unless the petition is dismissed as a matter of law, this proceeding is a proper one to be transferred for disposition to a term of the Appellate Division, First Department.

Wherefore, the respondents pray for an order herein dismissing the petition, or if this be denied, then in the alternative, for an order directing that the instant proceeding be transferred for disposition to a term of the Appellate Division, First Department, and for a final order dismiss-[fol. 18] ing the proceeding on the merits, and for such other and further relief as to the court may seem just and proper, together with the costs of this proceeding.

Dated, April 18, 1944.

Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents, Office & P. O. Address, Municipal Building, Borough of Manhattan, City of New York 7, N. Y.

(Verified by Alvin McK. Sylvester, April 19, 1944.)

In Supreme Court of New York, County of New York

(Same title)

Return

To the Supreme Court of the State of New York:

Alvin McK. Sylvester does hereby certify that this is a transcript of the record of the proceedings herein, together with his decisions, determinations, and actions, and all and singular the evidence, documents, records, and all other papers before him which were submitted to him relative to or concerning his determinations denying the petitioner's application for refunds, pursuant to Local Laws Nos. 20 of 1938, 103 of 1939, 78 of 1940, and 47 of 1941:

[fol. 19] 1. Petitioner's sworn returns of business tax due, based upon its gross receipts or income for the calendar

years 1938, 1939, 1940 and 1941, pursuant to the local laws herein involved.

2. Letters of application from the petitioner to the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, dated June 11, 1942, enclosing cancelled checks in the sums of $1,434.38, $1,175.77 and $985.53, previously forwarded to the Collector of the City of New York in payment of the business taxes, together with penalties and/or interest, measured by the petitioner's gross receipts or gross income during the calendar years 1938, 1939 and 1940, respectively, and demanding a refund thereof, and a hearing.

3. A letter of application from the petitioner to the respondent, Joseph D. McGoldrick, as Comptroller of the City of New York, dated November 7, 1942, enclosing petitioner's cancelled check for $1,346.59 previously forwarded to the Collector of the City of New York in payment of the business tax measured by the petitioner's gross receipts or gross income during the calendar year 1941, and demanding a refund thereof, and a hearing.

4. Minutes of hearings held pursuant to said demand, on February 1, March 2, April 5, and June 8, 1943, together with all exhibits received in evidence or for identification at said hearings.

5. Notice, dated December 30, 1943, from the respondent, Joseph D. McGoldrick, as Comptroller of the City of New [fol. 20] York, advising petitioner of respondent's final determination denying the petitioner's applications for refunds of the said taxes.

6. Undertaking, dated January 26, 1944, executed by the American Surety Company of New York, and approved as to form and sufficiency by William C. Hecht, a Justice of the Supreme Court of the State of New York, *nunc pro tunc* as of January 26, 1944.

This return is based upon the records of the proceedings which appear on file in the office of the Comptroller of the City of New York.

In Witness Whereof, the Deputy Comptroller of the City of New York has hereunto set his hand this 19th day of April, 1944.

Alvin McK. Sylvester, Deputy and Acting Comptroller of the City of New York.

[fol. 21] FINAL DETERMINATION OF RESPONDENTS (REFERRED TO IN FOREGOING RETURN)

Joseph D. McGoldrick, Comptroller. George Marlin, Special Deputy Comptroller.

The City of New York

Office of the Comptroller

Bureau of Excise Taxes

350 Broadway, New York City 13

WAlker 5-9530

In Reply Refer To:
Refunds Unit
Room 610 RO
M-142992

December 30, 1943.

John T. Clark & Son, 17 State Street, New York, N. Y.

GENTLEMEN:

This is in further reference to your claim for refund as follows:

Year	Tax	Penalty	Total
1938	$879.94	$105.59	$985.53
1939	1109.22	66.55	1175.77
1940	1434.48	—	1434.48
1941	1346.59	—	1346.59
	$4770.23	$172.14	$4942.37

[fol. 22] You are advised that as the result of a formal hearing which was concluded on June 8, 1943, the Comptroller has determined that your claim for refund of Business Tax, as shown above, be denied.

This determination is final and irrevocable.

Very truly yours, George Marlin, Special Deputy Comptroller.

RO:JS.

OFFICE OF THE COMPTROLLER, BUREAU OF EXCISE TAXES

Room 511

February 1, 1943. 2 P. M.

(Same title)

MINUTES OF HEARING

Before Morris Saltzman, Esq., Presiding Officer

For the Comptroller:
Jay Cohen, Esq., Assistant Corporation Counsel.

For the Taxpayer:
Attorneys: Baldwin, Todd & Lefferts, 120 Broadway, New York City; by Samuel M. Lane, Esq., of Counsel; John H. Alexander, Esq., of Counsel; Bliss Agnes, Esq., of Counsel.

Mr. Saltzman: This is a hearing to review applications by [fol. 23] John T. Clark & Son, 17 State Street, New York, claiming refund of Business Tax and penalty in the total sum of $4,942.37, comprised of the sum of $879.94 tax and $105.59 penalty, a total of $985.53, pursuant to Local Law 20 of 1938; the sum of $1,109.22 tax and $66.55 penalty, a total of $1,175.77, pursuant to Local Law 103 of 1939; the sum of $1,434.48 tax, pursuant to Local Law Number 78 of 1940; and the sum of $1,346.59 tax, pursuant to Local Law Number 47 of 1941.

Do you wish to make an opening statement, Mr. Lane?

Mr. Lane: All right.

OPENING STATEMENT

The taxpayer, John T. Clark & Son has made claim for refund of taxes for the years 1938, 1939, 1940 and 1941 levied by the City of New York upon the gross receipts of its business. It is engaged in the general stevedoring business in the port of Greater New York which, for the purpose of this hearing, may be divided into three areas: The first area is the New Jersey shore, the second the New York shore within the City of New York—that is, within the five boroughs that comprise the City of New York—and the third the New York shore outside of the City of New York.

It is the contention of the taxpayer, first, that the tax upon its gross receipts is unconstitutional, no matter whether those receipts are derived from business in the first, second, or third area, and that the tax is unconstitutional as a levy on interstate and foreign commerce and for other reasons set forth in the claims for refund and the protest under which the taxes were paid.

The taxpayer contends, second, that so much of the gross receipts as are derived from services rendered on the New Jersey shore are not subject to the Gross Receipts Tax [fol. 24] in that they are derived from business outside of the jurisdiction of the City of New York.

In this opening statement I have described the port of Greater New York as divided into three areas, but as a matter of fact, all the taxpayer's services are rendered in the first two areas, that is, all of its services are rendered either on the New Jersey shore or on the New York shore or on the New York shore within the confines of the City of New York.

In the opinion of the taxpayer there is no distinction to be drawn between the facts in this case and the facts in Puget Sound Stevedoring Co. against Tax Commission of State of Washington, et al., 301 U. S. 90.

(Discussion off the record.)

Mr. Lane: I ask you to produce the Excise Tax return for the year 1938, showing the payment of $985.53 under protest.

I offer said return with the accompanying protest as Taxpayer's Exhibit 1 in evidence.

Mr. Cohen: I have no objections to the introduction of the return itself, provided it wouldn't be characterized, because the return itself, or the exhibit, would speak on its own behalf.

Mr. Lane: I have no objection to that.

I offer the typewritten statement only for the purpose of showing that a protest was filed with the return and not as proof of any of the statements contained in the protest itself.

Does that satisfy you?

(Discussion off the record.)

Mr. Saltzman: Your offer is, then, of the return for the year 1938, and the three typewritten pages attached thereto?

Mr. Lane: That is satisfactory.

[fol. 25] Mr. Saltzman (to stenographer): Mark the tax return for the year 1938 and three typewritten pages attached thereto bearing date June 14, 1941, Taxpayer's Exhibit 1 in evidence.

(Received and marked Taxpayer's Exhibit 1 in evidence.)

Mr. Lane: I call upon you to produce the claim for refund of the tax shown in Taxpayer's Exhibit Number 1.

(Discussion off the record.)

Mr. Lane: Let me, then, withdraw my former request and ask you to produce return of Excise Tax for the year 1939, filed by the taxpayer. I offer said return in evidence, together with a statement of three pages annexed to it, as Taxpayer's Exhibit Number 2.

Mr. Cohen: No objection.

Mr. Saltzman: Mark the Business Tax return for the year 1939, and the three typewritten pages dated June 14, 1941 attached thereto, Taxpayer's Exhibit 2 in evidence.

(Received and marked Taxpayer's Exhibit 2 in evidence.)

Mr. Lane: I ask you to produce Excise Tax return filed by John T. Clark & Son for the year 1940. Thank you. I offer said return, together with accompanying statement annexed to it, as Taxpayer's Exhibit 3 in evidence.

Mr. Cohen: No objection.

Mr. Saltzman: Mark the tax return for the year 1940, and the three typewritten pages dated June 14, 1940, Taxpayer's Exhibit 3 in evidence.

(Received and marked Taxpayer's Exhibit 3 in evidence.)

Mr. Lane: I ask for the production of the return of Excise Tax on gross receipts filed by John T. Clark & Son [fol. 26] for the year 1941. I offer said return, together with statement consisting of two pages annexed to it, Taxpayer's Exhibit 4.

Mr. Saltzman: Mark the return for the year 1941, together with the two typewritten pages dated June 12, 1942 attached thereto, Taxpayer's Exhibit Number 4 in evidence.

(Received and marked Taxpayer's Exhibit 4 in evidence.)

Mr. Lane: I ask you to produce a letter dated June 11, 1942 from Baldwin, Todd & Young to the Comptroller of the City of New York, together with applications for refund of Excise Tax for the years 1938, '39 and '40, and in each case the check with which the tax was paid.

They being produced, I offer said letter, said applications for refund, and said checks all together as one exhibit.

Mr. Saltzman: Mark the letter from Baldwin, Todd & Young to the Comptroller of the City of New York, dated June 11, 1942, a carbon copy of said letter, check in the sum of $1,434.48, check in the sum of $1,175.77, and check in the sum of $985.53, and three applications bearing date of execution June 11, 1942, Taxpayer's Exhibit Number 5 in evidence.

(Received and marked Taxpayer's Exhibit 5 in evidence.)

Mr. Lane: I ask you to produce the letter from Baldwin, Todd & Young to the Comptroller of the City of New York, dated November 7, 1942, together with application for refund of Excise Tax on gross receipts for the calendar year 1941, together with the cancelled check by which said tax was paid.

[fol. 27] I offer said letter, application for refund, check and also the envelope in which the foregoing were mailed, as one exhibit.

Mr. Saltzman: Mark the letter dated November 7, 1942 of Baldwin, Todd & Young, addressed to the Comptroller of the City of New York, application, check in the sum of $1,346.59, and mailing envelope attached thereto, Taxpayer's Exhibit 6 in evidence.

(Received and marked Taxpayer's Exhibit 6 in evidence.)

Mr. Lane: May the record indicate that the six exhibits just offered were produced from the Comptroller's files?

Mr. Saltzman: The record will so indicate.

Mr. Lane: Now I will call Mr. Clark as a witness.

GEORGE JOHN CLARK, residing at Contant Avenue, Haworth, New Jersey, called as a witness on behalf of the taxpayer, was duly sworn and testified as follows:

Direct examination.

By Mr. Lane:

Q. Mr. Clark, what is your full name?
A. George John Clark.
Q. And where do you live?
A. Contant Avenue, Haworth, New Jersey.
Q. What is your business?
A. Contracting stevedore.
Q. Are you associated with John T. Clark & Son?
A. I am.
Q. Is that a corporation, or a partnership, or what?
A. It's a corporation.
[fol. 28] Q. Are you an officer?
A. I am.
Q. What is your office?
A. Vice-president.
Q. How long have you been associated with John T. Clark & Son?
A. Approximately twenty years.
Q. Will you tell us, if you know, when John T. Clark & Son was incorporated?
A. I believe in 1910; I am not sure of that but I think it was 1910.
Q. What is the nature, in general, of the business of John T. Clark & Son?
A. It's a business of loading cargoes into ships and discharging cargoes from ships.
Q. Is it right to call that the general stevedoring business?
A. That's right.
Q. Is that a business which you have been engaged in all your adult life?
A. That's right.
Q. Your father and grandfather engaged in that before you?
A. That's right.
Q. Under the name of John T. Clark & Son?
A. That's right.

Mr. Cohen: Please don't lead the witness.

Mr. Lane: I won't lead when we get down to important business.

(Discussion off the record.)

Q. Mr. Clark, when you began in the stevedoring business, what was the first employment that you had in it?

A. I started as a timekeeper.

Q. And how long did you continue at that?

A. About a year and a half.

Q. And then what did you graduate to?

A. Well, you might say I graduated to be an assistant to my grandfather.

[fol. 29] Q. And in that capacity what duties did you perform?

A. Well, I didn't have any title, if that's what you mean.

Q. I am trying to find out for the record the basis of your familiarity with the business to show that you know the business, so that it will appear on the record, and therefore I'll ask you just to describe the duties which you have performed in the stevedoring business for the taxpayer.

A. Well, you might say that after being a time-keeper for approximately a year and a half, familiarizing myself with that end of the business, at that time my grandfather took me around personally, around the various piers' operations that we had, and taught me the business, and when he felt that I knew enough about it to have some responsibility he so gave me that responsibility, which was the overseeing of the work to see that the cargo was properly handled and properly stowed in the ship, and I would say that that amounted to something like three to four years before he felt sure of me. Does that answer your question?

Q. And since that time?

A. Since that time I have been in charge of the operations.

Q. And are in charge of the operation today?

A. That's right.

Q. And were you in charge of the operations during the years '38 to 1941, inclusive?

A. That's right.

Q. And you still are in charge of them today?

A. That's right.

Q. So that it would be fair to characterize you as an outside man rather than as an office man?

A. That's true.

Q. Will you describe what you characterized as the general stevedoring business as performed by John T. Clark [fol. 30] & Son—first, let us say, with respect to the areas in the port of New York where it is performed? Where do you operate?

A. The North River, as it's so known,——

Q. Is that part of Manhattan?

A. That's right; that's the Hudson River, but commonly known as the North River in our business; the East River; all of Brooklyn water front—any particular place that you might have a ship there—Staten Island; Bayonne; Claremont; Jersey City; Hoboken; Weehawken; and Edgewater, Jersey side.

Q. And have you now named the places in the so-called port of Greater New York where you operate?

A. That's right.

Q. Will you tell us now which of those places are within the limits of New York City?

A. The North River, East River, Brooklyn water front and Staten Island.

Q. And which of those other places are in the State of New Jersey?

A. Edgewater, Weehawken, Hoboken, Jersey City, Bayonne and Claremont.

Q. Will you describe for us the operations performed by John T. Clark & Son, in a general way, without respect to where the business is performed—that is, will you describe the actual operations of loading and unloading vessels, and loading and unloading freight cars, and any other work that you do?

A. Well, let's take loading first. Before a ship is loaded the usual procedure of a stevedoring corporation would be——

Q. Just let me interrupt a minute. This isn't to be the usual operation of any stevedoring company, but the usual operation of John T. Clark & Son.

A. I see. Well, put it this way: John T. Clark & Son is given a ship to load by whoever it may be. Either myself or my representative is in close touch with the representa- [fol. 31] tive of the steamship company, or any government agency that might have control of the ship. Then we get a list of cargo going forward on the ship, showing weights

and measurements of that particular cargo, and the type of cargo, because some cargoes can't be stowed with one another. Then we have what we call a plan which shows the various compartments of the ship.

Q. Who draws that plan?

A. That's a regular printed form showing the usual compartments in the usual ship. If we run up against something unusual our plan clerk, who makes the plan up, will make that up himself to show on the plan. We then develop the job by figuring out the weights and measurements of the various cargoes, as I said before. We have to know, of course, the capacity of the ship that we are going to put the cargo in—the cubic capacity; also go into conference usually with the captain to find out how his ship acts at sea—some ships of the same types and sizes act differently at sea; and we load it according to the way he wants his ship stowed—that is, as far as the distribution of weight in the decks or the hold, whichever the case may be. Once that's decided on and we know what we are going to do, our hiring foreman then hires the longshoremen. It's my job to place the various superintendents or head foremen and put them in charge of the work. The job is started, and through the flow of cargo coming in depends how fast the ship can be loaded. In other words, if a cargo doesn't get here today we can't work; we have to wait for the next day when the cargo arrives. Once the cargo has been placed aboard the ship in a satisfactory manner the ship is ready for sea, hatches [fol. 32] are battened down and the ship is put in what we call ship-shape condition ready to go to sea.

Q. Now, let me go back just a little way on that. Does the taxpayer contract with different shipping companies for servicing, loading and unloading their vessels?

A. That's right.

Q. When a vessel is due to arrive—let us say at Pier 48, North River—is the taxpayer notified in advance of the expected arrival of the vessel?

A. He is.

Q. Then is that the point at which you go over the ship's plan?

A. As near that time as possible. Sometimes it's a day or two before that can be developed because of a change of cargoes that takes place.

Q. When a ship arrives—let's say at Pier 48—do you assist her in berthing?

A. We do.

Q. That is, you have men who handle the lines?

A. That's right.

Q. And then after the ship is berthed, who takes off the hatches; who rigs the booms, and performs such labor?

A. We do.

Q. When you have the ship's booms rigged and the hatches off, is the hold then ready to receive the cargo?

A. Not necessarily; it may be in a dirty condition and has to be cleaned.

Q. Could it also be a ship in ballast?

A. Yes; it could be that.

Q. If it's in ballast, who removes the ballast?

A. We do.

Q. And what do you do with it?

A. Put it on barges, usually.

Q. How do you get it from the hold of the ship into the barges?

A. Various means. One is what we call the bucket method in which we use the ship's gear, and the other method is [fol. 33] to use diggers, as we call them—floating diggers which have grabs, and take the cargo out that way.

Q. What sort of cargo is that?

A. Could be brick, rubbish, sand or sulphur; could be most anything that could be carried in bulk capacity.

Q. Now we assume that the cargo hold is ready to receive the cargo; where do you get the cargo from that goes into that hold?

A. From the pier or from a lighter.

Q. Assuming that you get it from the pier, do you put it on the pier, or does somebody else put it on the pier?

A. No; we don't put it on the pier usually. Usually the work of placing the cargo on the pier—if it comes in by trucks, delivered to the pier by trucks, the truck driver takes it off and places it on the pier. If it comes in by lighter there's another company which has the contract with the railroads to discharge lighters; they have to take it off the lighters and put it on the pier and separate it so that we can take it in its right continuity to get it into the ship.

Q. Then how will you describe this place on the pier where the cargo is when you commence your operations?

A. I don't quite understand your question.

Mr. Cohen: Excuse me a minute.

(Discussion off the record.)

(Hearing adjourned to Tuesday, March 2nd, at 10 A. M.)

[fol. 34] OFFICE OF THE COMPTROLLER, BUREAU OF EXCISE TAXES

Room 516

March 2, 1943, 10 A. M.

GEORGE JOHN CLARK, residing at Contant Avenue, Haworth, New Jersey, recalled as a witness on behalf of the taxpayer, was examined and testified as follows:

Direct examination.

By Mr. Lane:

Q. Mr. Clark, on page twelve of the stenographer's minutes of the first hearing at the foot of that page the following sentence appears: "The job is started, and through the flow of cargo coming in depends how fast the ship can be loaded." Will you state whether that correctly represents what you said or whether you can state that more clearly?

A. Well, I think it should have been that if the cargo doesn't arrive—I don't know whether I said that further on or not, but if the cargo that we want to start, that we have laid out to start in the ship does not arrive at the time we want to start the job, necessarily we can't start that cargo until it does arrive. On arrival, on the flow as it comes in on the pier or afloat depends the speed with which we can load the ship.

Q. The speed with which you load the vessel depends upon the speed with which the cargo arrives on the pier to be loaded?

A. That's correct.

Mr. Cohen: Are you offering additional evidence in connection with previous evidence?

[fol. 35] Mr. Lane: Let me state that I think——

Mr. Cohen: Because he has already explained it in the next sentence.

Mr. Lane: I think not, Mr. Cohen. The sentence reads: "The job is started, and through the flow of cargo coming in—"

Mr. Cohen: How about the next sentence?

Mr. Lane: I was only addressing myself to a sentence which doesn't make sense and is incorrect, and I asked Mr. Clark to explain it and he explained it and that is as far as I wish to go. The sentence as it reads does not make sense. It is a typographic mistranscription, I suppose. I thought I would make the record plain.

(Discussion off the record.)

By Mr. Lane:

Q. Mr. Clark, on that same page twelve you spoke of a plan. I show you a paper and ask you whether that is such a plan as you referred to.

A. Yes, it is.

Mr. Lane: I wish to offer that in evidence and for the purpose I have prepared a photostatic copy which omits the name of the vessel, the pier at which she was loaded, the sailing date, and the destination, because this vessel was loaded with munitions and I don't suppose that we should reveal the name and the information.

Witness: I couldn't allow it to go in.

[fol. 36] By Mr. Cohen:

Q. Why don't you take a plan of some contract that covers the period in issue instead of something that's beyond the period in issue?

A. We can't get them.

By Mr. Lane:

Q. Is this in all respects similar to the plans which were used in the tax years in question?

A. Identical.

Q. Mr. Clark, can you not produce such a plan for the tax years in question?

A. Well, I'll try. I'll go back to some back records and see if there happens to be one buried in there. We never

did keep them. We never made a practice of keeping them after two or three months.

Q. Do you keep them now?

A. We keep them now because of the war.

Q. Are you obliged to keep them now?

A. Yes. The copy of this is in the possession of the steamship company that we work for.

Q. Well, looking at the paper what does it show?

Mr. Cohen: Well, before we get to the showing let's see whether we are going to offer it or what we are going to do with it.

I object to the introduction of this paper in evidence upon the ground that it covers a period beyond the taxable period in issue and upon the further ground that the testimony seems to indicate that the taxpayer did not retain any of these similar plans during the period in issue.

Mr. Lane: I will ask that it be marked for identification.

[fol. 37] Mr. Saltzman: The objection is sustained.

Mr. Lane: I ask that the copy of the paper which I offered in evidence be marked for identification with the concession of the Comptroller that it is a photostatic copy of that paper except for the omission of the name of the vessel, the pier where she was loaded, the date of sailing, and the ports of destination.

Mr. Saltzman (to stenographer): Mark the photostatic copy referred to as a plan Taxpayer's Exhibit Seven for Identification.

(Received and marked Taxpayer's Exhibit No. 7 for Identification.)

By Mr. Lane:

Q. Mr. Clark, during the tax years in question when a vessel was to be loaded did you in each case work from some sort of plan?

A. Yes, always.

Q. Is Taxpayer's Exhibit Seven for Identification such a plan?

A. It is.

Q. Did such plans—strike that out.

Q. How did that type of plan show the layout of the holds and the places where the cargo was to be stowed?

A. I don't think I quite understand the question.

Q. Well, in Taxpayer's Exhibit Seven for Identification which you say is typical of the plans——

A. That's right; that's true.

Q. —something is shown. Is it a vessel in profile or a vessel observed from above or——

A. Well, the plan itself is in profile. The writing on [fol. 38] the plan itself is to show looking down from the top deck to the lower hold. There is no other way it can be put on a flat piece of paper to show where the various commodities are stowed. I mean the drawing of the plan is in profile.

Q. That is profile, isn't it?

A. That's right. You are looking from the side of the ship down and this is the keel here (indicating). This is to show that when you take this deck off—the hatches off, this wording here——

Q. What wording?

A. Rubber tires, so many reels of machine wire, and so many tons of it will be the first thing that will be reached as these hatch covers are taken off the hatch.

Q. Now, you are pointing on the plan to it. What is this, the second deck?

A. That is the lower hold.

Q. The lower hold?

A. This is your deck.

Q. Now, when you turn to the top of the plan are you still looking at it from profile or are you looking at it vertically from the deck down?

A. Looking at it from the deck down.

Q. So that the plan combines both a profile elevation and a picture looking from the deck down towards the keel?

A. That's right.

Q. One picture is superimposed on the other?

A. That's right.

Q. Let me ask you again, does this plan, Plaintiff's Exhibit Seven for Identification, and by that I mean the outline of the plan and not any of the information with respect to the particular cargo shown on the exhibit, conform in all respects to the type of plan which you were using during the tax year?

A. It does.

Mr. Lane: Well, I renew my offer of it in evidence.

[fol. 39] Mr. Cohen: Same objections.

Mr. Lane: I also wish to point out that at this the second hearing in this matter we brought this plan pursuant to the suggestion of Mr. Cohen that we show exactly what steps were taken in loading a vessel and as the witness has said we could not bring the plan for the years in question and we therefore brought one which is identical with plans used for the years in question.

Mr. Cohen: It may have been my suggestion to offer testimony that was more specific and that fully described the various transactions involved in the taxable years rather than to dwell upon general statements and to offer plans for periods beyond the taxable years. I think in the period of taxable years you must have hundreds of these plans and it should be an easy thing to obtain some of these plans if you want to use them or offer them in evidence.

Mr. Lane: The witness said there were none.

Mr. Cohen: No, he said the steamship companies have these plans and if he were to inquire he might be able to get some.

Mr. Saltzman: The objection is sustained.

By Mr. Lane:

Q. Mr. Clark, do you know whether the steamship companies have copies of the plans for the loading of cargo which was performed by John T. Clark & Son during the [fol. 40] tax years in question?

A. I can only presume that they do have; actually, I can't say that they have or haven't.

(Discussion off the record.)

Q. Mr. Clark, at the first hearing on page thirteen of the minutes I asked you whether the taxpayer contracted with different shipping companies for servicing, loading, and unloading their vessels and you replied that they did, and I now show you a paper entitled Cunard White Star Line which begins: Memorandum of agreement entered into this 29th day of January, 1940 by and between John T. Clark & Son, Contractor, and Cunard White Star Steamship Company, Ltd., and ask you whether that is one of the contracts to which you referred—whether that is a copy of one of them.

A. Yes, this is.

Mr. Lane: I ask that it be marked for identification.

Mr. Saltzman (to stenographer): Mark this copy of documents entited Memorandum Agreement, dated January 29, 1940, between John T. Clark & Son and Cunard White Star Steamship Company, Ltd., Taxpayer's Exhibit Eight for Identification.

(Received and marked Taxpayer's Exhibit No. 8 for Identification.)

By Mr. Lane:

Q. Mr. Clark, I also show you a paper headed Memorandum of Agreement between Ellerman & Bucknall Steamship Company, Ltd., and John T. Clark & Son, which pur-[fol. 41] ports to have effect from the first day of January, 1940 and ask you whether that is another of such contracts?

A. It is.

Mr. Lane: I ask that a photostatic copy of that be marked for identification.

(Discussion off the record.)

Mr. Cohen: The paper that is offered for identification is a photostat of an agreement which is not signed by taxpayer nor the steamship company.

Mr. Saltzman: That's correct, isn't it, Mr. Lane?

Mr. Lane: That's correct.

Mr. Saltzman (to stenographer): Mark the photostatic copy consisting of five pages of an unsigned carbon copy entitled Memorandum of Agreement between Ellerman & Bucknall Steamship Company, Ltd., and John T. Clark & Son, Taxpayer's Exhibit Nine for Identification.

(Received and marked Taxpayer's Exhibit No. 9 for Identification.)

By Mr. Lane:

Q. Mr. Clark, can you produce signed copies of Plaintiff's Exhibits Eight and Nine for Identification?

A. Well, I should be able to produce them. I don't know why they weren't sent up here.

Q. Well, will you produce them, if you have them, at the next hearing?

A. I certainly will.

Q. Look at the form of Plaintiff's Exhibits Eight and Nine for Identification and tell us whether they are typical of the contracts under which you operated during the times that those contracts were in effect.

A. Yes, these are typical stevedoring contracts, nothing [fol. 42] unusual in them at all.

Q. Did you have such contracts during the tax years with a number of different steamship operating companies?

(Discussion off the record.)

A. Yes.

Q. Approximately how many different steamship companies did you have such contracts with during the years 1938, 1939, and 1940?

A. Perhaps a half a dozen.

Q. Will you name them?

A. I don't think my memory can serve me that well. I'll have to have it right in front of me so I'd know what I was talking about.

Q. Name some of them.

A. I wouldn't even like to do that without something before me.

Q. Taxpayer's Exhibit Eight for Identification relates to the Cunard White Star Line. Did the taxpayer do stevedoring under such a contract for the Cunard White Star Line during the years 1938, 1939, and 1940, and 1941?

A. Yes.

Q. Then, Taxpayer's Exhibit Nine for Identification relates to the Ellerman & Bucknall Steamship Company, and I ask you the same question with respect to that company.

A. Yes.

Q. Was that done also for the Ellerman Wilson Line?

A. That's true.

Q. Did you do work for the Ellerman Wilson under the same type of contract in 1938, 1939, 1940, and 1941?

A. We did.

Q. I show you what purports to be a copy of the contract with the Oriole Lines back in November, 1933 and ask you [fol. 43] whether you also did stevedoring for them in 1938 to 1940.

A. I can't remember whether we did any work for them in 1938.

Q. 1939?

A. I can't remember. It is too far back for me to remember.

Q. 1940 or 1941?

A. No, not 1940 or 1941.

Q. I show you a paper headed Moore & McCormack Company, Inc., February 13, 1937, and ask you whether that refreshes your recollection as to whether you did general stevedoring for them under such contracts in the tax years in question.

A. I think in 1938.

Q. I show you a paper headed Panama Railroad Company, dated March 29, 1937, and ask you whether you did general stevedoring for that company in the tax years under contracts of this type.

A. Yes, we did.

Q. Which years? In the tax years?

A. All the years.

Q. Did you do it in 1938?

A. Yes.

Q. 1939?

A. Yes.

Q. 1940?

A. Yes.

Q. 1941?

A. And 1941.

Q. I show you a paper headed The New York & Puerto Rico Steamship Company, Puerto Rico Line, Santo Domingo Line, dated February 14, 1941, and ask you whether you did general stevedoring for that company under such a contract in the year 1938?

A. No.

Q. 1939?

A. No.

Q. 1940?

A. No.

Q. 1941?

A. Yes.

Q. I show you a paper headed Chilean Nitrate Sales Corporation, dated April 22, 1941, and ask you whether you did
[fol. 44] general stevedoring for that company under such a contract in 1938.

(Discussion off the record.)

A. Yes, we did.

Q. In 1938?

A. I don't remember.

Q. In 1939?
A. I don't remember.
Q. In 1940?
A. I don't remember.
Q. 1941?
A. Yes.

Q. I show you a paper headed American Republics Line, dated November 3, 1938, and ask you whether you did general stevedoring for that company under such a contract in 1938?

A. No.
Q. In 1939?
A. No.
Q. In 1940?
A. No.
Q. 1941?
A. No.

Q. I show you a paper headed Agreement entered into this 15th day of November by and between Munargo Line Company and John T. Clark & Son, and ask you whether you did general stevedoring for that company in the year 1938.

A. I don't think so.
Q. In 1939?
A. I don't think so.
Q. 1940?
A. Yes.
Q. 1941?
A. Yes.

(Discussion off the record.)

Mr. Lane: I offer for identification paper headed Agreement, November 15, 1940, between Munargo Line Company and John T. Clark & Son.

Mr. Saltzman: Any objections, Mr. Cohen?

Mr. Cohen: That's offered merely for identification?

[fol. 45] Mr. Saltzman: Yes.

Mr. Cohen: Not for identification, no.

Mr. Saltzman (to stenographer): Mark this document consisting of four pages, entitled Agreement between Munargo Line Company and John T. Clark & Son, dated November 15, 1940, Taxpayer's Exhibit No. Ten for Identification.

(Received and marked Taxpayer's Exhibit No. 10 for Identification.)

By Mr. Lane:

Q. Mr. Clark, at the conclusion of the first hearing in this matter you were describing how taxpayer loads a vessel and you had told us that you first agreed upon a plan for the disposition of the cargo, then assisted in the berthing of the vessel, that then you rigged the booms and hoisting gear and removed the hatches, and you were about to tell us where you picked up the cargo to put in the holds and how you did it. So let's resume from that point and my first question will be: Where do you get the cargo? Where does it come into your hands? We were, if you remember, supposing that the operations were being carried on at Pier 48, North River.

A. Well, we would pick the freight up from the pier and put it in the ship from that point.

Q. Who puts it on the pier?

A. Well, the cargo comes by trucks, is put on the pier by truckmen themselves, and from that point we pick it up, make it up into drafts and take it into the ship.

Q. Let me interrupt you. When you say you make it up into drafts what do you mean by that?

A. Well, you've got to—no matter what commodity of [fol. 46] cargo it is, whether it is cases or barrels or whatever it is, you have to put it in some sort of sling or container and hoist it aboard the ship, and our men put it in such slings or containers so it can be hoisted into the ship.

Q. So that you will better understand how the question may be answered let me just point out to you that although I know perfectly well what a draft is, this record will be before judges sitting in the courts and they might not know what a draft is. It is a technical word; that is the reason for my questioning you on it. What is a draft?

A. Well, a draft is——

Q. It is a sling of cargo or a bundle of cargo?

A. It is a sling or a bundle.

Q. Or a group?

A. Or a group of cargo in one particular spot that we put into a container of some sort that we might call a rope

sling, wire sling, or an airplane, or a crate, or what have you, and it is from that point that we hoist it into the ship.

Q. Let's assume that the ship that you are loading is on the north side of Pier 48 and that she is to take on among other things iron pipes which are delivered by lighter. Where would you take—where would the taxpayer first take possession of that pipe?

A. Well, after the lighter—it would, of course, come by lighter—after the lighter is placed alongside the hatch that we are working——

Q. Who places it there?

A. The steamship company hires the boat to place it alongside the ship, invariably.

Q. You have a man that goes down on the lighter beside the ship?

A. No, that is always an employee of the steamship company, a wharfinger.

[fol. 47] Q. You mean there are men already on the lighters that bring the pipe and they stay there and attach slings to the pipe?

A. Oh, no, it is only one man aboard the lighter, that is the lighter captain. He is in charge of that boat. This—it may be delivered by some railroad and it may not be delivered right alongside the ship, it may be delivered on the end of the pier and they tie up at the end of the pier and the steamship company hires an outside towboat which goes around and makes fast to the lighter and brings it alongside the side of the ship; when it is secured to the ship, then our men go over the side down on the ladder and sling the pipe up and then we hoist it from there into the ship.

Q. And if the lighter were tied up alongside the south side of Pier 48—we are assuming your vessel is on the north side—and had some cargo other than pipe, could you take delivery on the south side of the pier and transport the cargo across the pier and so into the hold of the vessel.

Mr. Cohen: Are these supposings hypothetical questions or are these practical questions?

Mr. Lane: These are practical questions designed to induce Mr. Clark to describe in detail the various places on or about the pier where the taxpayer takes possession of the cargo.

I'll withdraw my question and try to ask it more simply.

By Mr. Lane:

Q. You have told us, Mr. Clark, that the taxpayer takes [fol. 48] possession of the cargo on the pier where it is deposited by truckmen and also that it takes possession of cargo on lighters alongside of the hold into which it is to be loaded. Is there any place else in or about the pier where the taxpayer takes possession of cargo?

A. Yes, on the pier that has two decks or an upper level there may be cargo on an upper level which would be the same as the lower level so far as our operations are concerned. We would take it from the upper level directly into the ship. Also you spoke something about a lighter, I'd like to bring that out, on the opposite side of the pier in which the ship is berthed. If we found it practical and it was a commodity of cargo that we thought was practical, we would take it from that lighter or open barge, make it up into slings, hoist it off the barge with our dock cranes, run it across the dock and right into the ship, but invariably when we don't handle the cargo alongside the ship directly from the barge into the ship the cargo on barges is taken off the barges and piled on the pier by another contracting concern who has contracted with the railroads to do such a job.

Q. In other words, so far as cargo received on lighters is concerned you will take it directly from the lighter into the ship but not from the lighter onto the pier. Somebody else does that.

A. No, somebody else does that. We only do that when it is practical for us to do it.

Q. Now, from the point at which you take possession of the cargo whether it is from the lighter alongside the hold or from the upper or lower deck of the pier is there any interruption in its flow from that point into the hold of the ship?

A. No, there is none.

Q. When it arrives in the hold of the ship who secures it [fol. 49] there?

A. The longshoremen that are working in the hold.

Q. Whose longshoremen are they?

A. Belonging to our company—employed by our company, I should say.

Q. That is, the taxpayer does it?

A. That's right.

Q. When cargo is not stowed in the hold but is stowed on deck, who secures it there?

A. Well, invariably the taxpayer secures that cargo.

Q. After the cargo is loaded into the holds and the deck cargo is loaded, does the taxpayer—is the taxpayer through or does it perform some other operation about the ship before the ship sides?

A. I might clarify that by saying that after the cargo is loaded in the ship——

Q. In the holds?

A. In the holds or decks of the ship—that's inside decks—to the complete satisfaction of the representative of the steamship company or the captain of the ship and the deck cargo is placed aboard the outside deck and secured and beams, hatches, booms, everything in shipshape condition, ready to go to sea, the only other job that the taxpayer has is letting go the lines of the ship so that it can go out on the river and proceed to sea.

Q. I thing you told us at the last hearing that the first thing the taxpayer does after the vessel is berthed is to rig the booms and remove the hatches and prepare the holds.

A. That's right.

Q. The last thing you do is just the reverse of that, is to unrig the booms, replace the hatches?

A. That's right.

Q. Now, with respect to various gear used to perform the operations that you have described, will you tell us what [fol. 50] part taxpayer furnishes and what part the steamship company furnishes?

A. Well, the steamship company furnishes all winches, all booms, falls for the cargo booms, rain tents for working in the rain, floats between ship and dock, all fenders, thing that covers the steamship's end of it pretty well.

Q. Night lights and——

A. Night lights; you work nights, of course that's supplied by the steamship company. Sometimes savealls are supplied by the steamship company; that's a net that stretches between the side of the ship and the dock so that if any cargo should fall out of a sling it saves it from going into the river. Invariably they are supplied by the steamship company. Sometimes they are supplied by the contractor. The contractor, or taxpayer in this instance, supplied all mechanical equipment, all wire slings or any special

sling that might be used for special cargo in which to transport the cargo from the place it rests on the pier to the side of the ship and from the side of the ship into the ship.

Q. That is, if a dock crane is necessary to get cargo from the pier to the ship the taxpayer furnishes it?

A. Well, you——

Q. You say to get the——

A. You and I might have a different idea of a dock crane. Any heavy lift over five ton, it is handled into the ship, if the ship's gears can't hoist that cargo then the steamship company supplies the heavy derrick in which to hoist the cargo into ship. What I meant by mechanical equipment are dock cranes, are the cranes that we own, that we sling the cargo up on the dock, as I have said before, and transport it to the side of the ship where it is hooked on to the ship and [fol. 51] then taken into the ship. It can be taken by a crane or a tractor or a hand-truck or some other mechanical means.

Q. And when I described mechanical equipment you meant dock cranes of that type and hand-trucks and tractors?

A. That's right. That's our obligation.

Q. Will you describe the way in which you operate by gang? You have told us about the gear and the equipment; now I want you to tell us about the division of the men into gangs to perform this work, under whose supervision they work.

A. Well, the men, the longshoremen themselves are under the direct supervision of the head foreman or superintendent, as the case may be, on the pier.

Q. Whose head foreman and whose superintendent is that?

A. Belonging to the taxpayer; working for the taxpayer. The men themselves are hired by taxpayer's hiring foreman who tells them what men to go in the hold, what men to go on the dock, and what men to go on the deck, such as winchmen and so forth.

Q. Let's assume that we have a ship that has been berthed at Pier 48 and you have agreed upon a plan, the cargo has arrived, and you are to start loading that vessel at eight o'clock tomorrow morning. Where do you get the men and how do you gather them together to begin that work?

A. Well, in this particular port men who work along the docks more or less are divided up into sections. Men following Pier 48 wouldn't follow any other pier or any other section. They work in that section. At night word is spread around that the ship will start tomorow morning. The men are there and the hiring foreman goes out and hires them.

[fol. 52] Q. What time of day is that?

A. Usually eight o'clock in the morning.

Q. Where does he appear to hire them? Outside the pier?

A. Outside the pier.

Q. Does he have a booth there or something?

A. No, he just goes out in the open and blows a whistle, the men stand in line, and he goes out and picks them individually.

Q. Well, then, after he's picked them, who is it, you say, that divides them into gangs and directs them to do the particular jobs?

A. Well, the hiring foreman designates what man is to work in what gang. He makes up the gangs. He designates what men are to work in the holds, what men are to work on the dock, and what men are to work on deck, and then his jurisdiction stops.

Q. Now, wait a second; how large is each gang?

A. Consisting ordinarily of twenty men to the gang.

Q. Is there a particular man in charge of each gang?

A. There is. He is called the hatch foreman.

Q. Who picks him?

A. The hatch foreman is picked by the head foreman.

Q. Well, is he selected in the same way that the nineteen men underneath him are, or do you have certain hatch foremen that are regular employees?

A. Most of all our hatch foremen are regular employees shifted from point to point, wherever they're needed.

Q. So that the hatch foremen are not among those who report at eight o'clock. They are regular employees and they are each given a gang of men?

A. That's right.

(Discussion off the record.)

[fol. 53] Q. You have told us, Mr. Clark, about the gangs and their selection and the foremen that have charge of the gangs. Are there other men employed in the operation

of loading the vessel who don't fall within these gangs that you have described?

A. Well, yes, there's our head foreman that I mentioned before. He has an assistant usually.

Q. What is his title?

A. Assistant foreman. They're steady payroll men, they are not hourly basis men at all. On most all the piers we have besides that what we call a superintendent who has full charge of all the operations on that pier, the head foreman taking orders from him, and the assistant foreman taking orders from the superintendent and the head foreman. The shipping foreman, as it is termed in the port of New York, comes under the jurisdiction of our superintendent and takes his orders from him as to how many gangs are to be hired and how many men to the gang. I might clarify that by saying that when I say the number of men to the gang I mean that the normal loading operation calls for twenty men in the gang. That's the union agreement, but we might find conditions either in the ship or due to a class of commodity that requires more men, so that's why I mentioned that the superintendent is the one who orders the number of men in the gang and the hiring foreman actually goes out and does the hiring of the men.

Q. What might it be in a gang?

A. It might be twenty-five, thirty, thirty-five men, depending on the particular job, as those are only isolated cases.

Q. When you speak of pier superintendent is that a job [fol. 54] that you yourself perform?

A. I didn't mean pier superintendent meaning that it had anything to do with the steamship company; we maintain a pier superintendent; the steamship company also maintains a pier superintendent, and between the pier superintendent and the captain or any other designated representative of the steamship company that we operate our business through——

Q. Wait a moment. The captain of the steamship to be loaded, there is the pier superintendent hired by the steamship company, and, then, there is taxpayer's pier superintendent?

A. That's right.

Q. Are those the three top men in this operation that you are describing?

A. They are.

Q. Well, now, let's go right down in the hierarchy from the captain of the ship down through the lowest foreman, which, I presume, is the hatch foreman, and you tell us what the function of each of those men is. First, the captain of the ship.

A. Well, the captain of the ship usually is more in an advisory capacity. In other words, the captain of the ship when he comes into port has got an awful lot to do. The pier superintendent working for the steamship company and the pier superintendent working for the taxpayer develop the loading of this particular ship. When they have it down to their satisfaction they then call in the captain to look it over, to see if he has any objections. If he hasn't any objections we go ahead according to that plan. The further functions of the pier superintendent working for the steamship company is to take full charge of all the clerical staff who receive the cargo for the steamship company or deliver it as [fol. 55] the case may be. The checkers that check the cargo, the watchmen that are on the pier to watch the cargo, and any other men working for the steamship company come under the jurisdiction of the pier superintendent working for the steamship company. The pier superintendent working for the taxpayer is the direct representative of the taxpayer's company. He has in charge—or rather, he is in charge of the operation which consists of a head foreman, assistant foreman, and a shaping foreman, and a time keeper; all gear and maintenance men on that particular pier come under his jurisdiction. The job of head foreman is to carry out the loading of the ship under the supervision of the superintendent for the taxpayer. The assistant foreman is there to simply assist the head foreman in any department that the head foreman wants him to assist him in. The hatch foreman is there to——

Q. Wait a second. You have got the head foreman and the assistant foreman, then you skipped over the shaping foreman.

A. I already explained what his duties are. Do you want me to explain it again?

Q. I think so.

A. The shaping foreman's duties are to maintain a good class of labor on that particular pier, to hire the men, to see that they reach the particular gang in which he's designated them to work in and also to see that they're

doing the job they're supposed to do. His job also is to keep law and order among the longshoremen. He is held responsible for the actions of the men that he hires. I think that fully describes the shaping foreman. Now, the hatch foreman. The hatch foreman is a foreman in charge [fol. 56] of the gang of men which may consist of twenty or more men. He receives his orders from the head foreman, what he is supposed to do. His job is to carry it out, to see that the men properly sling the cargo up, that it gets into proper compartments in the ship and it is properly stowed.

Q. Let me interrupt you a moment on that. We'll take a plan in the form of Taxpayer's Exhibit Seven for identification—withdraw that.

Q. What are typical instructions that are given to a hatch foreman by the head foreman?

A. Well, his——

Q. How does he know what to load and where to get it and when to load it?

A. The head foreman tells him where the cargo is, where he is to put it. His responsibility is to see that he's using proper gear to handle that particular cargo. If it's heavy cases down the hold it would have to be hauled into place. It is his job to see that he has the proper snatch blocks and proper extra wire falls and hooks and every description of gear to do that job. That is his responsibility; to know what he has to use and see that he has it on the job and see that he is using it.

Q. Does his responsibility begin at the foot of the ship's tackle, or let's say, on the upper deck of the pier, if that is where the cargo is?

A. You could take any particular point and say that is where his particular responsibility begins. He is responsible for the stowage after the cargo is received in the hold; he is responsible that his booms and winches are in good condition; he is responsible for the gear that the men are using in the hold; he is responsible for the actions of the men working under him; no matter what he is doing from start to finish.

[fol. 57] Q. You said he had something like twenty men in a gang under him. Do you mean that all twenty men are in the hold of a ship or may there be ten there and ten across the dock making up drafts?

A. No, the usual distribution of men is one which is controlled by agreement with the union, that eight men at all times shall be in the hold of the ship, the distribution of the other men is up to the stevedore.

Q. By that you mean up to the taxpayer?

A. That's right.

Q. Is it up to the hatch foreman where he puts the other twelve men in a gang?

A. No, that is up to the head foreman to tell how many men he wants on the dock or how many extra men he might want in the hold. The only stipulation is there must be eight men in the hold at all times.

Q. My only difficulty is this: you call this man a hatch foreman which, in my ignorant way of thinking about it, seems to indicate a man that's at the hatch, and I wonder whether he has any responsibility except to get the cargo off the dock and in through that hatch and stowed or whether he also has to direct the transporting of the cargo across the pier to the foot of the ship's tackle.

A. Well, perhaps it would be clearer if we called him a gang foreman; that might be clearer. He is the foreman in charge of that particular gang.

Q. But you call him a hatch foreman because that is the usage of the business?

A. The usual procedure in the port is to call him a hatch foreman.

(Discussion off the record.)

Q. Have you now sufficiently described the duties of the various foremen?

A. I have.

[fol. 58] Q. In addition to the foremen are there other men employed by the taxpayer who are not members of the gangs?

A. None outside of those that I have previously mentioned.

Q. Well, does a twenty-man gang, for instance, include men who operate winches?

A. Yes.

Q. Perhaps what you had better do is to take a twenty-man gang and treat that more or less as you have the foremen and describe the particular duties of the various men in the gang.

A. Well, let's start with the hold of the ship, what we call the hold-men. They only work in one place and that's in the ship's hold. There are eight men at all times there to do that work. Then, on the deck of the vessel we have three men, two men who operate the winches, one man, whose title is gangway-man, is in reality a signal man to signal to the winch-men when to go ahead or when to come back on the winches. Then we have two men called stringpiece men. Those men land the draft from the conveyance that brings it to the stringpiece. I might add that the stringpiece is between the shed of the pier and the ship. At that particular point, the stringpiece, when the cargo is delivered, the stringpiece-men hook on from the ship's hooks that particular draft of cargo, send it in the ship. The empty draft or sling is then put on the conveyance that brought the cargo to the stringpiece and goes back to the pile for another draft of cargo. The dock-men are those men who sling up the cargo in draft form to be loaded in the ship. I think I've covered it.

Q. I think that covers it—well, so far as the gang is concerned in loading or unloading. What about rigging or unrigging, do you have men that do that?

A. When you speak of rigging a ship, the usual proce- [fol. 59] dure there is the three men that I spoke of before that work on the deck, they're brought out usually at the start of the ship about an hour before the rest of the men are brought in. It is their job along with the hatch foreman to go down, hoist the booms, see that the winches are in working condition, placing the saveall net, and taking off the hatch covers and removing the beams—the hatch beams—from the ship before the rest of the men are brought onto the pier or onto the vessel, whichever the case may be, so that when the rest of the men are brought in the ship is ready then to go to work. That would be the only time that we could call anybody riggers; that's when they are actually doing rigging jobs.

Q. Well, do you have painters and carpenters and repair men?

A. We have a regular maintenance department which includes painters, carpenters, blacksmiths, welders, mechanical equipment mechanics.

Q. And they are in addition to the twenty in the gang?

A. Oh, yes, they work in our maintenance shop. They don't work on the piers.

By Mr. Cohen:

Q. Their job is to keep your equipment in good order?

A. That's right.

Q. They never get to the pier, do they?

A. Well, yes, they do get to the pier. In other words, if there is a tractor or crane breaks down on the pier they're sent there to repair that particular tractor or crane or if we damage a lighter the carpenters are sent there to fix the lighter up, things like that.

[fol. 60] Q. But their situs is where? Not at the pier, at the machine shop or some such place.

A. That's right.

By Mr. Lane:

Q. Is there any other operation in the loading of the vessel which we've omitted?

A. Well, of course, we've spoken entirely of general cargo up to now. There is such a thing as loading bulk cargoes into ships.

Q. Such as grain?

A. Such as grain, any particular type of ballast.

Q. Well, how do you load bulk cargoes?

A. Well, for instance, grain, of course, is loaded by the grain elevators when it is in a bulk condition, which has nothing to do with the taxpayer because the grain elevators come alongside and do that work themselves under the jurisdiction of the pier superintendent for the steamship company. Ballast invariably is loaded into the ship by what we call floating cranes for that purpose. When they are not available the bulk cargo is loaded in the ship by what we call the bucket method. Those buckets are put over the side in the canal-boat or whatever type of boat it happens to be. Our men shovel the bulk into the bucket and then the bucket is hoisted aboard by the ship's gear and then dumped into the ship and then, of course, we have men in the hold who trim this bulk cargo to keep it in a level condition and not allow it to pyramid.

Q. Well, those—that's quite a different operation, then, than this twenty-man gang?

A. Oh, yes.

[fol. 61] Q. Is that covered by a different union agreement?

A. Yes, it is.

Q. Let's talk a minute about the union agreements. What is it that regulates the working hours and wages and working conditions of the men hired by the taxpayer?

A. Well, it is an agreement entered into between the International Longshoremen's Association and the New York Shipping Association.

Q. I show you a pamphlet and ask you whether that is the agreement you referred to.

A. Yes, this covers the general cargo repairmen, checkers, cargo repairmen, clerks, and port watchmen.

Mr. Lane: I ask that that be marked for identification.

Mr. Saltzman (to stenographer): Mark this booklet entitled Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association Taxpayer's Exhibit Eleven for Identification.

(Received and marked Taxpayer's Exhibit No. 11 for Identification.)

By Mr. Lane:

Q. Mr. Clark, is the taxpayer a member of the Contracting Stevedores of the Port of Greater New York and vicinity?

A. Yes. I might add for the record that they are members of the New York Shipping Association which makes that agreement.

Q. How do you arrive at the wages that you pay the men in the gang that you have described?

A. Well, it's one of those bargaining propositions. The [fol. 62] representative of the unions come in to the Shipping Association, ask for increases, the Shipping Association figures it out pro and con and finally arrive at some agreement that satisfies both parties.

Q. Do you take part in those discussions yourself?

A. Not me personally, no.

Q. Does the taxpayer?

A. Yes.

Q. Then after a satisfactory agreement has been arrived at between the union and the New York Shipping Association is it embodied in a pamphlet such as this, Taxpayer's Exhibit Eleven for Identification?

A. Yes.

Q. Is this such a pamphlet?
A. Yes, it is.

Mr. Lane: I offer it in evidence.

(Discussion off the record.)

Mr. Cohen: We'll take it for whatever it's worth.

Mr. Saltzman (to stenographer): Mark the booklet previously marked Taxpayer's Exhibit Eleven for Identification as Taxpayer's Exhibit No. Eleven in evidence.

(Received and marked Taxpayer's Exhibit No. 11 in evidence.)

By Mr. Lane:

Q. Mr. Clark, this Exhibit Eleven in evidence is a pamphlet effective January 1, 1940. Is this just one of a number of similar pamphlets that are published from time to time?
A. Yes.
Q. Has taxpayer been hiring its stevedores pursuant to the rates set forth in pamphlets of this kind all during the tax years in question, for 1938, 1939, 1940, and 1941?
A. Yes.

[fol. 63] Q. Will you tell us in general terms about the distinction, if any, between the rate of pay for longshoremen working on deep sea cargo and longshoremen working on coastwise cargo.

A. There always has been a differential of pay between longshoremen working on so called deep water ships and longshoremen working on coastwise ships. Differential as near as I can remember amounts to, I think, ten cents an hour. In other words, the men working for the coastwise steamship companies get ten cents an hour less than the men working on the deep water ships. Why that differential is there is something that I can't answer. It is one of those things that's been handed down year after year.
Q. Which rate do you pay your men?
A. On a deep water rate. We do no coastwise work.
Q. Let me ask you, then, as that brings up another point, about the destination of these vessels that you load. You say you do no coastwise work. What was the destination of the vessels that you loaded in 1938, 1939, 1940, and 1941?
A. All the vesels that we handled in those years that you speak of all went to foreign ports; therefore, they're classi-

fied as deep water ships, if you are referring to the rate of pay for the longshoremen.

Q. I think up to this point we have been—or, let me ask you, up to this point in giving your answers have you not been proceeding on the assumption that we were discussing the loading and unloading of the steamships in North River?

A. Yes.

Q. Let me ask you about the loading and unloading of steamships in Hoboken. In the first place, in Hoboken do you take possession of the cargo from trucks as you do in New York?

[fol. 64] Mr. Cohen: I object to the question. It is leading and calls for a conclusion.

Mr. Saltzman: Objection sustained.

By Mr. Lane:

Q. Mr. Clark, please tell us whether the taxpayer in the years 1938, 1939, 1940, and 1941 loaded anything except oceangoing vessels.

A. No.

Q. Did the taxpayer in those years receive cargo from carriers other than steamships, lighters, and automobile trucks?

A. Yes, in Hoboken we received cargo from railroad cars.

Q. Did you load any cargo into railroad cars?

A. Yes, we did.

Q. Well, now, that's the point I wish to make. Did you do that any place except Hoboken?

A. No.

Q. Will you describe what you did in connection with loading or unloading freight cars in Hoboken.

A. Well, in Hoboken there is a railroad known as the Hoboken Shore Road for which we are under contract to load and/or discharge cargoes from freight cars to the docks and from the docks onto the freight cars. That's the only location we have such a job. In Hoboken we can at various times discharge a ship and then load that cargo that we have discharged from the ship directly into the freight cars or vice versa, taking the cargo out of the freight cars and loading it directly into the ship.

Q. And do you in loading the freight cars perform on a smaller scale the same sort of functions that you perform in

loading a steamship; that is, do you break out the cargo and [fol. 65] do you lash the cargo and do you——

A. Well, of course, in discharging the freight car itself there isn't much to that. We open the doors of the car and if it's braced we have to break the bracing to get the cargo out, and by the same token in loading the cargo into the freight cars if it happens to be barrel stuff or something like that it is our duty to chock it off so it can't move in transit.

By Mr. Cohen:

Q. Where else does your company do work besides Hoboken and North River piers?

A. Brooklyn.

By Mr. Lane:

Q. Where else?

A. Staten Island.

By Mr. Cohen:

Q. East River?

A. No, we don't do anything in the East River. Claremont, Bayonne, Carteret, Sewaren.

By Mr. Lane:

Q. Is what you have told us about loading and unloading freight cars in Hoboken the only thing different from the testimony that you have given us with respect to loading and unloading ships in North River? Do you have to run over your whole testimony again or will your testimony fit the Hoboken job except that in Hoboken you do also load and unload freight cars?

A. In Hoboken also during the tax years in question we did load the sea-train ships.

[fol. 66] Q. Let me first, before you describe that, then, ask you whether that is the only other point that needs clarification?

A. I would say so; that is the only point.

Q. The wages and the working conditions and the agreements with the longshoremen and the destination of the ships, all the various operations we've covered describe what you do in Hoboken as well as in New York?

A. Yes.

Q. Now, what about the sea-train?

A. The sea-train, the only difference there is that instead of unloading a ship package by package we load the whole entire freight car right down inside the ship, it is placed on rails that there are already in the ship and then that particular car or cars are chocked and lashed in such a manner as to make them seaworthy and that ship goes out to sea with the miscellaneous cargo but in a freight car.

(Discussion off the record.)

Q. Does the taxpayer make up gangs and hire them out to steamship companies?

A. No.

Q. Mr. Clark, you spoke of the ships' sailing to foreign ports. Is the reverse of that true? Do they come from foreign ports?

A. Oh, yes.

Q. Mr. Clark, I think during these two hearings we've emphasized the loading of the ships. When you come to the unloading of the ships is everything that you have said true in reverse order?

A. Yes, it is.

Q. So that the only distinction in the operation is that the cargo is moving in the other direction?

A. That's right.

(Discussion off the record.)

[fol. 67] Cross-examination.

By Mr Cohen:

Q. What is the address of the taxpayer, Mr. Clark?

A. Seventeen State Street, New York City.

Q. Does it have any office or other place of business besides?

A. No, that is the main office.

Q. Does it transact all its business at that office except for the loading and unloading of boats?

A. It transacts all its business at that address.

Q. And does it receive contracts and enter contracts at this address?

A. That's right.

Q. No other address except this one?

A. That's right.

Q. Where does it have its machine shops?

A. The machine shop is located at the corner of 42nd Street and Second Avenue in Brooklyn.

Q. Are you familiar with the amount of business that was done by the taxpayer during these years to the extent that you could distinguish or differentiate between the amount of income received from work that was performed within the City of New York and work performed over in New Jersey?

A. I don't think I could answer that very intelligently.

Q. Did the taxpayer during any time during these taxable years sublet or subhire any of its employees to any other stevedoring companies for the performance or assistance in the performance of any of their contracts?

A. No, we did not.

Q. Who negotiates the various contracts for the taxpayer?

A. It is myself or the vice-president, Mr. Harold J. Beardell.

Q. Does the taxpayer maintain its bank accounts in the City of New York?

A. Yes, we do.

[fol. 68] Q. And performs all of its corporate functions within the City of New York?

A. Yes, we do.

Q. Is it a New York corporation?

A. It is.

Q. Does the taxpayer—is the taxpayer required to have a license from any governmental authority——

A. No.

Q. —in the performance of its duty? Do you file any certificate with the United States Shipping Board or with the Customs House?

A. May I ask what you mean by certificate.

Q. Certificate of doing business.

A. Not that I know of.

Q. Was any financial statement required of the taxpayer by any governmental authority during the taxable years?

A. None that I know of except the usual statement that's rendered to the Internal Revenue Department for tax purposes. That is the only one I know of.

Q. What other activities does the taxpayer engage in besides loading, unloading vessels, and making the inci-

dental repairs to keeps its equipment—its own equipment—in good order and condition?

A. None.

Q. Is it engaged in financing contracts of other stevedoring companies?

A. No, it does not.

Q. Does it have any interest directly or indirectly in any steamship companies or vessels or joint ventures?

A. None whatsoever.

Q. Does the taxpayer sell steamship tickets or assist in any way in the engaging of ship space for companies?

A. No, it doesn't.

Q. During the taxable years did any of these ships that were loaded by the taxpayer stop at any other ports of the United States upon its way to any destination to foreign ports?

A. Yes, Steamship Munargo.

[fol. 69] Q. Any others?

A. None others that I am acquainted with.

Q. Where did she stop and what did she do?

A. She stopped at Miami, she took passengers for Miami and cargo and picked up passengers and cargo at Miami. Her other two ports of call were Nassau and Havana.

(Discussion off the record.)

Mr. Saltzman: Let the record note that exhibits marked for identification have been returned to attorney for taxpayer.

Hearing adjourned to April 5, 1943 at ten o'clock.

OFFICE OF THE COMPTROLLER

Bureau of Excise Taxes

April 5, 1943 Room 516 10 A. M.

Mr. Cohen: It is hereby stipulated by the taxpayer and Special Deputy Comptroller that Exhibit 10 marked for identification shall be substituted by the original contract and received in evidence as Exhibit 10.

Mr. Lane: I ask that a photostat which I produce be marked in place of the original contract of November 15th, 1940.

Mr. Saltzman: Is that agreeable to you, Mr. Cohen?

Mr. Cohen: Yes, on the condition that the original can always be made available to us for examination and inspection at our office.

Mr. Lane: I agree to that.

[fol. 70] Mr. Saltzman (to stenographer): Mark the photostat of the document, described as a contract, dated November 15, 1940, between Munargo Line Company and John T. Clark & Son, Taxpayer's Exhibit 10 in evidence.

(Received and marked Taxpayer's Exhibit 10 in evidence.)

Mr. Cohen: As for Exhibit 9 for Identification, we will accept an agreement effective July 1, 1939, between Bucknall Steamship Company, Limited, and John T. Clark & Son, Inc. in lieu of the said exhibit.

Mr. Lane: In lieu of the original contract, effective July 1, 1939, I ask that a photostatic copy, which I produce, be received and marked in evidence.

Mr. Cohen: We will receive it upon the same condition as Exhibit 10.

Mr. Saltzman (to stenographer): Mark the photostatic copy of the document, described as an agreement between Ellerman and Bucknall Steamship Company, Limited, and John T. Clark & Son, Inc., effective from July 1, 1939, Taxpayer's Exhibit 9 in evidence.

(Received and marked Taxpayer's Exhibit Number 9 in evidence.)

(Discussion off the record.)

[fol. 71] David Joseph, residing at 180 East 79th Street, New York, produced as a witness on behalf of the taxpayer, after being duly sworn, testified as follows:

Direct examination.

By Mr. Lane:

Q. Mr. Joseph, will you state your full name and address for the record?

A. David Joseph, 180 East 79th Street, New York City.

Q. What is your profession?

A. Accountant.

Q. Among your clients, do you include John T. Clark & Son, Inc.?

A. I do.

Q. Have you conducted an annual audit of their books?

A. We conduct a monthly audit.

Q. Monthly audit. How long have you been doing that?

A. I would say somewhere back to 1934—1932.

Q. Did you audit their books for the years 1938, 1939, 1940, and 1941?

A. I did.

Mr. Lane: Well, Mr. Saltzman, may I have the tax returns for those years?

Mr. Saltzman: Those returns have been marked in evidence.

By Mr. Lane:

Q. I show you Taxpayer's Exhibit 1 in evidence, the return of Excise Tax on gross receipts for the year 1938. I call your attention to item 11, total gross receipts, and ask you whether you can tell us what part of that total came from business done in New Jersey.

(Off the record.)

[fol. 72] Witness:

A. The total receipts indicated by the return are $879,942.65, which compares with my record of the total receipts for the year 1938. Of that total $165,076.80 was received for services rendered in the State of New Jersey.

Q. I show you Taxpayer's Exhibit 2 in evidence, Return of Excise Tax on Gross Receipts for the year 1939, and call your attention to item 11, total gross receipts of $1,169,219.24, and ask you what part of that figure came from business done in New Jersey.

A. Of that total, the sum of $73,780.03 was receipts from services performed in New Jersey.

Q. I show you Taxpayer's Exhibit 3, return of Excise Tax on Gross Receipts for the year 1940, and call your attention to item 12, which shows total gross receipts in the amount of $1,434,479.81, and ask you the same question with respect to that.

A. Of the total of gross receipts, the sum of $86,100.85 was for services rendered in the State of New Jersey.

Q. I show you Taxpayer's Exhibit 4 in evidence, Gen-

eral Business and Financial Tax return, gross receipts for the calendar year 1941, and call your attention to item 12, which shows total taxable receipts of $2,693,182.59, and ask you the same question with respect to that.

A. Of the total of gross receipts shown, the sum of $446,801.60 was for services rendered in the State of New Jersey.

Mr. Lane: That's all.

(Off the record.)

Mr. Lane: I think it should be made clear on the record [fol. 73] that taxpayer offers the foregoing testimony by Mr. Joseph subject to audit by the Comptroller. The offer is made merely to lay the foundation for a subsequent argument on a point of law and it is not intended to foreclose the right of the Comptroller to subsequently challenge the figures.

(Off the record.)

Mr. Cohen: The condition stated by Mr. Lane is accepted, provided that any time during these proceedings or at any subsequent time the Comptroller may substitute the audited figures for the income received from services rendered within the State of New Jersey at any time for any one or all of these years, and that the receipt of these figures is not intended to be an acceptance on the part of the Comptroller that these services were actually rendered in the State of New Jersey nor that these proceeds were received from such services.

Mr. Saltzman: Have you any question to ask of Mr. Joseph, Mr. Cohen?

Mr. Cohen: I have questions to ask in cross-examination on these figures and on the audit, but I would prefer to postpone them until such time as an audit is made of the taxpayer's records and our auditor's report will be available.

Mr. Lane: It is agreeable to me.

(Off the record.)

Mr. Saltzman: Hearing adjourned to May 6th, at 10:00 A. M.

[fol. 74] OFFICE OF THE COMPTROLLER

Bureau of Excise Taxes

June 8, 1942 Room 516 2 P. M.

GEORGE JOHN CLARK, residing at Contant Avenue, Haworth, New Jersey, recalled as a witness on behalf of the taxpayer, testified as follows:

Redirect examination.

By Mr. Ansnes:

Q. Mr. Clark, at the hearing held in this case on March 2, 1943, Mr. Lane asked you whether you did general stevedoring work for the Munargo Line Company in 1938 and 1939. On page 14 of the stenographer's minutes of that hearing it appears that you answered with respect to each year, "I don't think so." I hand you a paper entitled "Agreement entered into this 28th day of April, 1938 by and between Munargo Line Company, a Delaware corporation, hereinafter called the steamship company, and John T. Clark & Son, a New York corporation, hereinafter called the contractor," and ask you if that refreshes your recollection as to whether you did general stevedoring work for the Munargo Line Company in 1938.

A. Originally the question was asked from memory, wasn't it?

Q. Yes, that's correct.

A. This is the contract.

Q. You did general stevedoring business for Munargo Line Company in 1938?

A. Yes.

By Mr. Cohen:

Q. How long was this contract in force, Mr. Clark?

A. That contract, as near as my recollection goes, was [fol. 75] about somewheres in the neighborhood of a year and a half. I became confused when the question was asked because I thought the contract for that particular work was made out to the United Fruit Company, which is the owner of Munargo Steamship Line, but to be absolutely correct in my statement I had to say I don't know, because I didn't want to state it one way or the other.

Q. Did your corporation perform any work under this contract?

A. We did.

Q. Was it an isolated case or was it continuous work?

A. (No response.)

(Discussion off the record.)

By Mr. Ansnes:

Q. Mr. Clark, I hand you a letter on the letterhead of Munargo Line Company, dated March 7, 1939, addressed to John T. Clark & Son, 17 State Street, New York, New York, in which in the first paragraph it is stated, and I quote: "We confirm verbal agreement of March 4 with your Mr. J. Balbach relative to receiving and delivering cargo at Pier 48, North River, New York," and ask you whether that refreshes your recollection as to whether you did general stevedoring work for Munargo Line Company in 1939.

A. Well, this hasn't anything to do with stevedoring. This particular agreement has to do with the delivering and receiving of cargo, and we continued stevedoring under that original agreement there.

Q. Under the agreement dated April 28, 1938 which I handed to you?

A. That's right; that's the stevedoring contract. That is the furnishing of men to receive and deliver cargo.

[fol. 76] Q. You did do general stevedoring work for the Munargo Line Company in 1939?

A. That's right.

(Discussion off the record.)

Q. Did you under the letter of March 7, 1939 furnish men to any other corporation or organization for the purpose of performing work under that letter?

A. No.

Q. But the men to which you referred were your own employees?

A. That's right.

Q. They were paid by you for performing the work?

A. That's right.

By Mr. Cohen:

Q. What do you mean by furnishing men to remove cargo, Mr. Clark?

A. Well, originally the steamship company themselves were doing this particular work and found that it was better to have one man do all of the operations on the pier. This particular operation is fruits and perishable cargoes, and so forth; have to be loaded on the trucks; have to be loaded on to freight cars across the dock waiting to take outside shipment; and also for the handling of passengers' baggage—that means putting a few porters on to carry it down and put it aboard ship for them.

Q. Does this operation take place before the loading of the vessel or after?

A. It could take place while the vessel is loading, as well as after. I mean sailing day you are still working cargo as well as receiving passengers. All go down together and board the ship together.

Q. And is this service apart from your general stevedoring services?

[fol. 77] A. No; that's part of a stevedore's responsibility; only in some instances some companies prefer to do that themselves.

Q. You mean steamship companies?

A. Yes.

Q. How do you hire men in the performance of this operation?

A. We hire them in the same way that we hire longshoremen. The same man that hires the gangs that do the loading of the cargo hires the men and places them at the different places where he wants them to do this particular type of work, and if they are not doing this kind of work they don't stand around; they pitch right in and work in the gangs too, and if some passengers come down we put these men to work handling the baggage.

Q. Is the compensation different for this type of service than it is for regular stevedoring—that is, compensation paid to you?

A. Well, in some instances there isn't any compensation; it's gratis, and at other times you are paid on the basis of so much a man or so much an hour, or so much per passenger. It's been done that way.

Q. Is this a frequent type of service that your company performed in these years of 1938 to 1941?

A. Yes, we have been doing it right along on this particular line where they were handling these passengers.

Q. Is there any other type of services that your corporation rendered to these various steamship companies other than stevedoring and the services we were just discussing?

A. No.

Q. Did you ever have occasion during these four years to let out some of your men to other stevedoring companies?

A. No.

Q. To let out any of your employees to any of the steamship companies other than for the two types of services?

A. No—you mean to hire men and turn them over to [fol. 78] the steamship company to do with as they please? No; if we hire men we must be the ones that are responsible for every act of those men, so therefore our superintendents are the ones that give them the orders and not the men from the steamship company.

Q. About what percentage of the total gross receipts would you attribute to this matter of hiring of men for the services that you have just been describing?

A. Well, I couldn't answer that absolutely, Mr. Cohen, but I am reasonably sure that it's very very small; taking into consideration the entire payroll of a ship's operation, this particular type of work would be very very little.

Q. Would you venture a percentage?

A. I wouldn't like to.

By Mr. Saltzman:

Q. Referring to the type of services mentioned in this letter dated March 7, 1939, were these services covered in your contract with the Munargo Line? For example, take Taxpayer's Exhibit Number 10 in evidence, which is a contract between Munargo Line Company and John T. Clark & Son. Are such services included and covered by that contract?

(Discussion off the record.)

Witness:

A. Yes; this is a typical contract.

Q. That isn't responsive. Are the types of services referred to in this letter of March 7, 1939 included in the contracts, Taxpayer's Exhibit Number 10 in evidence?

A. Yes.

(Discussion off the record.)

[fol. 79] Q. Who paid the men performing the services referred to in this letter of March 7, 1939?

A. Who paid the laborers?

Q. That's right.

A. John T. Clark & Son.

Q. If you furnished the services of a baggage master, who paid them?.

A. John T. Clark & Son.

Q. And who paid any laborers that cleaned docks, passenger waiting rooms, or offices?

A. John T. Clark & Son.

By Mr. Ansnes:

Q. Such laborers were your employees?

A. They were.

By Mr. Saltzman:

Q. And who gave directions or orders to any of the men performing services referred to in the letter of March 7, 1939?

A. Our head foreman.

By Mr. Ansnes:

Q. Are the services to which you have been referring usual in certain types of stevedoring contracts?

A. Yes, they are.

Q. Mr. Clark, at the hearing held in this case on March 2, 1943, the following appears on page 10 of the stenographer's minutes, and I quote: "Look at the form of Plaintiff's Exhibits 8 and 9 for Identification and tell us whether they are typical of the contracts under which you operated during the times that those contracts were in effect." To which you answered, and I quote: "Yes, these are typical stevedoring contracts, nothing unusual in them at all." [fol. 80] I hand you Taxpayer's Exhibit 9 and Taxpayer's Exhibit 10 in evidence, and ask you to state whether those are typical stevedoring contracts.

A. Yes, they are.

By Mr. Cohen:

Q. Have you read those contracts?

A. Yes.

Q. Are you familiar with the terms of those contracts?

A. I couldn't quote them, no.

Q. How do you know that they are typical contracts?

A. From just glancing over them I can see that they are about what is usually in a stevedoring contract.

Q. Are you in charge of contracts for the taxpayer?

A. Sometimes.

Q. Do you negotiate the contracts?

A. Not usually.

(Discussion off the record.)

By Mr. Ansnes:

Q. Mr. Clark, at the hearings held in this matter on February 1, 1943 and March 2, 1943 you testified that in performing your work of loading and unloading ships one of your first operations is to prepare a plan of the ship to be loaded or unloaded. I hand you a paper showing in profile and from a vertical point of view what appears to be a plan of a ship, and ask you whether that is such a plan as to which you referred in your testimony.

A. It is.

Q. And where did you get this plan?

A. From our files.

Q. Will you state, without revealing the name of the ship, the date upon which she sailed, as set forth on that plan?

A. December 4th, 1939.

[fol. 81] Mr. Ansnes: I offer the paper, which I have characterized as a plan, in evidence, and ask permission to substitute for the original a photostatic copy which is in all respects the same as the original except that there is omitted the name of the ship, the name of John T. Clark & Son, and the date upon which the ship sailed.

I offer such plan in evidence.

By Mr. Cohen:

Q. Is this a plan that taxpayer corporation drew up on one of the jobs on which it performed services during the years under discussion here?

A. It is.

Q. Who drew this plan?

A. One of our plan clerks.

Q. And how does he draw one of these plans—from what sources of information?

A. He is supplied with a list of cargo going forward in a particular ship. During the course of the loading of that ship he keeps in constant contact with the head foreman in charge of the loading of that ship as to where the various cargoes are going, according to the original rough sketch that is laid out before the actual operation is started, and during the course of loading the ship he jots down on his plan exactly in what compartment—whether the hold, deck, between deck, on deck, or what have you; just where this cargo is going. The port of destination is arrived at by various colors of which there is a breakdown on the top here showing these colors so that the chief officer of that ship knows where the various cargo is stowed, so that when he gets to various ports he knows where the cargo is stowed. [fol. 82] Also, a copy of this cargo plan is given to the stevedore at the other end upon arrival of steamer so that he can see the type of cargo he must discharge and then organize his pier to receive such cargo, whether it's large stuff, small stuff, or penalty cargo such as wet hides or something that's obnoxious and must be stored on the pier away from other cargo. That's why it's necessary to have such a plan.

Q. And the purpose of the plan is what?

A. I think I have just explained that.

Q. To enable the unloading of the vessel and indicate where the cargo is after it has been loaded?

A. That's right.

Q. You perform both types of services, loading and unloading?

A. We do here in New York.

Q. When you unload, a plan is given to you by the steamship company?

A. It is.

Q. Now, is this plan here one given to you by the steamship company or one that your firm drew and gave to the steamship company?

A. This is one that we drew and gave to the steamship company.

Q. Your company loaded this vessel?

A. That's correct.

Q. And is the drawing of these plans the usual procedure?

A. It is.

Mr. Saltzman: Any objection, Mr. Cohen?

Mr. Cohen: No; we will take it for what it is worth.

Mr. Saltzman: Mark the photostatic copy of a loading plan Taxpayer's Exhibit Number 12 in evidence.

(Received and marked Taxpayer's Exhibit 12 in evidence.)

[fol. 83] By Mr. Ansnes:

Q. Mr. Clark, I ask you whether Taxpayer's Exhibit Number 12 in evidence is such a plan as you testified to in the hearings held in this matter on February 1, 1943 and March 2, 1943.

A. It is.

Mr. Ansnes: That's all I have to ask him.

Recross-examination.

By Mr. Cohen:

Q. Did your corporation also import or export any merchandise besides rendering stevedoring services during the four years at issue?

A. No.

Q. Does it receive any income from any other source whatsoever other than the two types of services which you testified to?

A. No.

Q. Does it do any financing of any kind?

A. No.

Q. Did it give discounts or rebates to anybody to obtain the contracts or the business during the years at issue?

A. Do you mean by that a sort of commission to get business?

Q. Yes.

A. No.

Q. Do you give any discounts to any of the steamship companies' officers or agents or others?

A. That would be pretty hard for me to say; I can't remember. There may have been some bill that was made out wrong, or something like that; I wouldn't want to answer that question just that way.

Q. Did it share the remuneration of the contracts with anybody during any of these years at issue?

A. No.

Q. Did it pay any commissions to any of the steamship companies—agents, employees or others—during any of the years at issue?

A. No.

[fols. 84-85] Q. Did the taxpayer have any subsidiary corporations?

A. No.

Q. Did it have any interests in other corporations during the years in issue?

A. You mean by that John T. Clark & Son as a company?

Q. Yes.

A. No.

Q. Did any of its officers, stockholders or directors have any interest in any other corporation?

Mr. Ansnes: I will object to that question. I think it is immaterial, has nothing to do with the tax liability of John T. Clark & Son.

Mr. Cohen: Well, the purpose of the question is to ascertain whether or not certain types of services are segregated by the taxpayer between itself and other companies which it owns or controls directly or indirectly.

Mr. Ansnes: The witness has testified that the taxpayer does not own any other corporation directly or indirectly, and I can't see the bearing on this question——

(Discussion off the record.)

(The stenographer read the last question.)

Mr. Cohen (to stenographer): Add to that question, "——engaged in the same or a similar line of business."

(Discussion off the record.)

Mr. Saltzman: Objection sustained.

Mr. Ansnes: Taxpayer rests.

Mr. Saltzman: Anything further, Mr. Cohen?

Mr. Cohen: No, except for the reservations appearing on pages 5 and 6 of the minutes of April 5, 1943.

Mr. Saltzman: Hearing closed; decision reserved.

Taxpayer's Exhibit 1 in Evidence

Form 30 B — PAID UNDER PROTEST — Page 1 of Return

THE CITY OF NEW YORK—DEPARTMENT OF FINANCE—EMERGENCY REVENUE DIVISION
90 LAFAYETTE STREET, NEW YORK CITY—WOrth 2-4780

THE TAX DUE ON THIS RETURN IS PAYABLE ON JUNE 15, 1939

Do Not Mail Coin, Currency or Stamps in Payment of Tax. Cash Payments to be Legal, must be made Only to the Cashier at his Window. Payment should be made in the Borough where the Taxpayer Conducts his Business, before 3 o'clock P. M., Saturdays 12 Noon. The Borough Offices of the Bureau of City Collections are Shown Hereinbelow.

Mail This Return with Remittance to the City Collector On or Before June 15, 1939

RETURN OF EXCISE TAX ON GROSS RECEIPTS

(Pursuant to Local Law 20 of 1938)

Local Law 20 of 1938 (Chapter 41-0 of the Administrative Code) imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment.

GROSS RECEIPTS FOR THE CALENDAR YEAR 1938

or Period Began ..... 193... and Ended ..... 193...

A period other than the calendar year 1938 is to be used only by a person commencing business after January 1, 1938, as set forth in Section 041-3.0 (g) of the law (See Instruction Sheet).

DO NOT WRITE IN THESE SPACES

File Code

Business Code

Entered by

Audited by

MAKE CHECKS PAYABLE TO THE ORDER OF CITY COLLECTOR

This Space for Name and Address

TAXPAYER'S EXHIBIT NO 2 IN EVIDENCE 2/14/43

JOHN T. CLARK & SON
17 STATE STREET
NEW YORK N Y

N 142992

1910

11766/17

ANSWER ALL QUESTIONS ON THIS FORM

KIND OF BUSINESS Stevedores — Entered on N.Y. 7381

DATE BUSINESS COMMENCED March 1910 — D. 6-15-739

MAKE CHECKS PAYABLE TO CITY COLLECTOR

GROSS RECEIPTS

Item and Instruction Number				
1.	Receipts from sales in trade or business (Less: Sales returned) (Not included in Item 2)			
2.	Receipts from sales as allocated (Item 34, Page 2 of Return)			
3.	Receipts from services rendered (other than from profession or vocation) (Not included in Item 4)			
4.	Receipts from services rendered as allocated (Item 44, Page 2 of Return)			
5.	Receipts from profession or vocation		879	942 65
6.	Receipts from interest on bank deposits, notes, bonds, loans, etc.			
7.	Receipts from dividends on stocks of domestic and foreign corporations			
8.	Receipts from royalties			
9.	Receipts from premiums received in and from risks in New York City from the business of insurance			
10.	Other receipts from commercial activities (Explain in Schedule D)			
11.	Total gross receipts to be used as a measure in computing the tax (Items 1 to 10, inclusive) (*If this return is for a period less than one year, compute tax as indicated below*, Items 13 to 18, inclusive)		879	942 65
12.	Tax due the City of New York (1/10 of 1% of Item 11)			879 94
13.	Penalties and/or interest (See *Instruction Sheet*) June 15, 1939 to June 15, 1943 — 10%			105 59
14.	Total tax, penalties and/or interest (Item 12 plus Item 13)			985 53

COMPUTATION OF TAX BASED ON A RETURN FOR A PERIOD LESS THAN ONE YEAR (SEE INSTRUCTION SHEET)

15.	Total gross receipts (Item 11)		
16.	Number of days for which this return is made (Period shown above)	Days	
17.	Total gross receipts (on a per annum basis) to be used as a measure in computing the tax (Item 15 multiplied by 360 and the product thereof divided by Item 16)		
18.	Tax due the City of New York (1/10 of 1% of Item 17)		
19.	Penalties and/or interest (See *Instruction Sheet*)		
20.	Total tax, penalties and/or interest (Item 18 plus Item 19)		

LOCATION OF BOROUGH OFFICES OF THE BUREAU OF CITY COLLECTIONS

MANHATTAN	Room 100, Municipal Building
THE BRONX	Tremont and Arthur Avenues
BROOKLYN	Room 1, Municipal Building
QUEENS	Court Square, Long Island City
RICHMOND	Room 12, Borough Hall, St. George, S. I.

Cashier's Stamp
32-219

1 800 40 RECOPAY Check

3393198553

Receipt of payment will be recorded by machine in this space. Do not accept hand-written receipt.

1/1

SCHEDULE A
ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SALES IN INTERSTATE COMMERCE
(TO BE USED BY PERSONS HAVING RECEIPTS FROM SALES IN INTERSTATE COMMERCE)

Item No.	RECEIPTS		Amount
21.	Gross receipts from sales (Less: Sales returned)		$
22.	Less—Receipts from sales in foreign commerce (Less: Sales returned)	$	
23.	Receipts from non-allocable and non-taxable sales: Sales returned	$	
24.	Wholly taxable and allocable receipts (Item 21 minus Items 22 and 23)		$
25.	Less—Wholly taxable receipts (Item 1, Page 1 of Return)		$
26.	Allocable receipts (Receipts from sales in interstate commerce)		$
	Divide (a) by (b) to obtain percentage		
27.	(a) Average real and tangible personal property within New York City	$	%
	(b) Average real and tangible personal property within the United States	$	
28.	(a) Wages, salaries and other personal service compensation in New York City	$	%
	(b) Wages, salaries and other personal service compensation in the United States	$	
29.	(a) Wholly taxable receipts (Item 25) plus ½ of allocable receipts (½ of Item 26)	$	%
	(b) Wholly taxable and allocable receipts (Item 24)	$	
30.	Total percentages (Items 27 to 29, inclusive)		%
31.	Average percentage (Item 30, divided by three)		%
32.	Allocable receipts (Item 26) multiplied by Item 31 or 66⅔% whichever is less		$
33.	⅓ of allocable receipts (⅓ of Item 26)		
34.	Allocated receipts subject to tax (Item 32 or Item 33, whichever is greater) (Enter as Item 2, Page 1 of Return)		$

SCHEDULE B
ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SERVICES IN INTERSTATE COMMERCE
(TO BE USED BY PERSONS HAVING RECEIPTS FROM SERVICES IN INTERSTATE COMMERCE)

35.	Gross receipts from passenger service	$	
36.	Gross receipts from freight service		
37.	Total (Item 35 plus Item 36)		$
38.	Less—Gross receipts from foreign commerce	$	
39.	Gross receipts from non-allocable and non-taxable services		$
40.	Wholly taxable and allocable receipts (Item 37, minus Items 38 and 39)		$
41.	Less—Wholly taxable receipts (Item 3, Page 1 of Return)		$
42.	Allocable receipts (Item 40 minus Item 41)		$
	Divide (a) by (b) to obtain percentage		
43.	(a) Number of passenger and/or freight miles within the State of New York used as a basis in determining the rates charged for services rendered		%
	(b) Number of passenger and/or freight miles within the United States used as a basis in determining the rates charged for services rendered		
44.	Allocated receipts subject to tax (Item 42 multiplied by percentage obtained in Item 43) (Enter as Item 4, Page 1 of Return)		$

SCHEDULE C
REAL AND TANGIBLE PERSONAL PROPERTY EMPLOYED IN BUSINESS

	Classification of Property	TOTAL Real and Tangible Personal Property Employed Within the United States	Real and Tangible Personal Property Employed Within the City of New York	Real and Tangible Personal Property Employed Within the United States But Without the City of New York	
				Amount	City or Town and State
45.	Real Estate (See note below)	$	$	$	
46.	Machinery				
47.	Motor vehicles and other delivery equipment				
48.	Merchandise purchased for sale				
49.	Other tangible personal property				
50.	Total real and tangible personal property (Items 45 to 49, inclusive) (Enter on Item 27)	$	$	$	

NOTE—Real property within the City of New York shall include all property subject to tax as real estate under the Tax Law of the State of New York.

Form 99 B

Page 3 of Return

SCHEDULE D

DETAILS OF ITEM 10, PAGE 1, OF RETURN

EXPLANATION	Amount
	$

SCHEDULE E

ENTER HEREINBELOW ALL GROSS RECEIPTS NOT INCLUDED ON PAGE 1, OF RETURN

Nature of Receipt	Reason for Exclusion from Gross Receipts	Amount
		$

ANSWER ALL OF THE FOLLOWING QUESTIONS

The books of this taxpayer are in the care of Taxpayer

Located at 17 State Street, New York City

Was a return filed under Local Law No. 22 of 1937, as amended? Yes

If so, give name and address under which said return was filed Same

Is this business in any way an outgrowth, result, continuation or reorganization of a business or businesses in existence prior to the date shown on page 1 of the return? No If answer is "yes," give name and address of such predecessor business and the date of the change in entity

Was the present business discontinued prior to June 30, 1939? No

If answer is "yes," give date when operations were discontinued

Was the business legally dissolved? Date of dissolution

Remarks:

1/3

86b

ALLOCATION AND APPORTIONMENT OF RECEIPTS IN INTERSTATE COMMERCE

EXTRACT—ARTICLE 33B: Section 041-2.0(b) of the Administrative Code of the city of New York provides that where a receipt in its entirety cannot be subjected to the Business Tax by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocated to the doing of business in the city of New York shall be taxed.

A person who claims that his receipts are not taxable, in whole or in part, by reason of the provisions of the constitution of the United States or any other provision of law, shall include in his return of gross receipts the information and computations called for below in this article, with respect to the period covered by the refund. Any such person who fails to include in his return the information called for, shall be deemed to have waived all rights to an allocation of his receipts, in whole or in part, by reason of the constitution of the United States or any other provision of law.

INFORMATION AND COMPUTATIONS REQUIRED IN ALLOCATING RECEIPTS FROM SALES IN INTERSTATE COMMERCE

INFORMATION REQUIRED

1. The average of the value of the real and tangible personal property of the business within New York City, at the beginning and end of the measuring year.

2. The average of the value of the real and tangible personal property of the business both within and without New York City but within the United States only, at the beginning and end of the measuring year.

3. The total wages, salaries and other personal service compensation paid during the measuring year in connection with the business carried on in New York City. (Wages, salaries and other personal service compensation shall be allocated to New York City when paid to employees who work in, or from, or are attached to, places of business situated within New York City.)

4. The total wages, salaries and other personal service compensation paid during the measuring year in connection with the business carried on within and without New York City but within the United States only.

5. Gross receipts (hereinafter referred to as "wholly taxable receipts") received during the measuring year in, or by reason of any sales made or services rendered or commercial or business transactions had in the city of New York, and not subject to allocation.

6. Gross receipts received during the measuring year in, or by reason of any sales made or services rendered or commercial or business transactions which are required to be allocated by virtue of the provisions of the constitution of the United States or other provision of law (hereinafter referred to as "allocable receipts").

COMPUTATION OF RECEIPTS SUBJECT TO TAX

The amount of gross receipts subject to the tax at the statutory rate or rates shall be determined as follows: (a) Compute the percentage which the average of the value of the real and tangible personal property of the business within New York City, at the beginning of the measuring year, and at the end of the measuring year (Item 1), bears to the average of the value of the real and tangible personal property of the business both within and without New York City but within the United States only, at the beginning of the measuring year, and at the end of the measuring year (Item 2).

(b) Compute the percentage which the total wages, salaries and other personal service compensation paid during the measuring year in connection with the business carried on in New York City (Item 3), bears to the total wages, salaries and other personal service compensation paid during the measuring year in connection with the business carried on within and without New York City but within the United States only (Item 4).

(c) Compute the percentage which the sum of the wholly taxable receipts (Item 5) plus one-third (1/3) of the allocable receipts (1/3 of Item 6), bears to the sum of the wholly taxable receipts (Item 5) plus the entire allocable receipts (Item 6).

(d) Determine the average of the three percentages so obtained (Items (a), (b) and (c) above) by adding them and dividing the total by three. In the event such average percentage exceeds 66⅔ percent, it shall be reduced to 66⅔ percent, for the purposes of the computation to be made under Method 1 below.

METHOD 1—Apply the average percentage thus derived (Item (d) but in no event to exceed 66⅔ percent) to the allocable receipts (Item 6) and, to the amount so obtained, add the wholly taxable receipts (Item 5).

METHOD 2—Compute one-third (1/3) of the allocable receipts (1/3 of Item 6) and, to the amount so obtained, add the wholly taxable receipts (Item 5).

GROSS RECEIPTS SUBJECT TO TAX

The amount of gross receipts subject to the tax at the statutory rate or rates is the amount of receipts resulting from Method 1 or Method 2, whichever is greater.

NOTE—The term "measuring year," as used in this article, refers to the year or, if less than a year, to the period the receipts of which are used as the measure of the tax.

AFFIDAVIT OF TAXPAYER

I swear (or affirm) that this return, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 20 of 1938 and the regulations issued under authority thereof.

GOMEZ V. CLARK & SON

Name of Business or Taxpayer

Harry H. Clark, Pres.

Agent or officer of corporation, trustee, etc.

Title

Sworn to and subscribed before me

this 16 day of June, 1941

Stanley Oliver

Signature of officer administering oath

Notary Public, New York County

N.Y. Co. Clk's No. 89 Reg. No. 2-O-114

Commission Expires March 30, 1943

If this return was prepared by some person other than an officer, partner or employee of the taxpayer, the following affidavit must be executed:

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules) is a true, correct and complete statement of all the information with respect to the business tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Sidney Terata

Signature of person preparing this return

Arnold Graphic Company

Name of firm

Sworn to and subscribed before me

this 16 day of June, 1941

Stanley Oliver

Signature of officer administering oath

Notary Public, New York County

N.Y. Co. Clk's No. 89 Reg. No. 2-O-114

Commission Expires March 30, 1943

[fol. 87] John T. Clark & Sons
17 State St.
New York, N. Y.

June 14, 1941

City Collector, Department of Finance, Room 100, Municipal Building, New York, New York.

DEAR SIR:

Enclosed herewith is my return of excise tax on gross receipts (Form 39 B) for the calendar year 1938, together with my check to your order in the amount of $879.94, in full payment of the tax shown due on the return. I wish to reserve my rights to recover all or any portion of such payment, and, accordingly, make such payment under protest and solely for the purpose of avoiding the imposition of any penalties and the waiver of any rights which I might otherwise have. In addition thereto the following grounds of protest are asserted.

1. Local Law 20 of 1938, under which said tax is assessed, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States in that it purports to tax receipts of the taxpayer derived from sales in interstate and foreign commerce and thus constitutes a burden on interstate and foreign commerce.

2. Said local law is in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York in [fol. 88] that it deprives me of property without due process of law.

3. Said local law is invalid in that it delegates to the Comptroller of the City of New York power and authority to establish rules and regulations and/or methods of allocation and evaluation of receipts derived from transactions in interstate and foreign commerce.

4. Said local law is in violation of the Enabling Act, Laws of 1934, Chapter 873, as amended, in that it purports to authorize the imposition of a tax on transactions originating and/or consummated outside of the territorial limits of the City of New York.

5. The rules and regulations and methods of allocation and evaluation adopted by the Comptroller of the City of New York in the Regulations promulgated by him as of April 1, 1939, and said regulations as amended, purporting to be under and pursuant to said local law, are arbitrary, confiscatory and unreasonable, and are contrary to the provisions of said local law and operate to deprive me of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York.

6. The Enabling Act, Laws of 1934, Chapter 873, as amended, purporting to grant authority to the City of New York to enact said local law is invalid and contrary to Article I, Section 8, Clause 3 and to the Fourteenth Amendment of the Constitution of the United States and Article I, [fol. 89] Section 6 of the Constitution of the State of New York in that it purports to authorize the imposition of a tax based upon the gross receipts of a person doing business in the City of New York.

7. Moreover it is the taxpayer's contention that its income as stevedore is tax exempt as interstate or foreign commerce in accordance with Puget Sound Stevedoring Co. v. Tax Commission of State of Washington et al ('37), 302 U. S. 90, 58 Sup. Ct. 72.

Very truly yours.

(Here follow 4 photolithographs, side folios 90, 90a, 90b, 90c.)

Taxpayer's Exhibit 2 in Evidence

Form 30B — PAID UNDER PROTEST — Page 1 of Return

THE CITY OF NEW YORK—DEPARTMENT OF FINANCE—EMERGENCY REVENUE DIVISION
90 LAFAYETTE STREET, NEW YORK CITY—WOrth 2-4710

THE TAX DUE ON THIS RETURN IS PAYABLE ON JUNE 15, 1940

Do Not Mail Coin, Currency or Stamps in Payment of Tax. Cash Payments to be Legal Must Be Made Only to the Cashier at His Window. Payment Should Be Made in the Borough Where the Taxpayer Conducts His Business, Before 3 P. M., Saturdays 12 Noon. The Borough Offices of the Bureau of City Collections are Shown Hereinbelow.

Mail This Return with Remittance to the City Collector On or Before June 15, 1940

RETURN OF EXCISE TAX ON GROSS RECEIPTS

(Pursuant to Local Law No. 103 of 1939)

Local Law No. 103 of 1939 (Chapter 41-B of the Administrative Code) imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment [illegible]

GROSS RECEIPTS FOR THE CALENDAR YEAR 1939

or Period Begun ____ 19__ and Ended ____ 19__

A period other than the calendar year 1939 is to be used only by a person commencing business after January 1, 1939, as set forth in Section B41-5.0 (a) of the law (See Instruction Sheet).

PRINT NAME, ADDRESS AND FILE NUMBER

JOHN T. CLARK & SON
17 STATE STREET
NEW YORK N Y

B-316992

YES'S [illegible] 2/1/43 N2 [illegible] 1CLDCh7

FOR DEPARTMENTAL USE ONLY

Bus. Code ____
Pay. Code 3
Refer to Liens ____
Int. Due $ 2.44 (A)
Tax Paid ____ .65
Balance $ 1.77 48
Penalty (5%) ____
Penalty (10%) ____
Total $ ____
Checked by ____
Bill No. 7369
Billed by BB-9/2 141

KIND OF BUSINESS Stevedoring
DATE BUSINESS COMMENCED March 1910

MAKE CHECKS PAYABLE TO CITY COLLECTOR

GROSS RECEIPTS

1. Wholly taxable receipts from sales in trade or business (Less: Sales returned) (Not included in Item 2)				
2. Allocated receipts from sales in interstate commerce (Item 33, Schedule A, Page 2 of Return)				
3. Wholly taxable receipts from services rendered (other than from profession, vocation, etc.) (Not included in Item 4)			1 109 239 96	
4. Allocated receipts from services in interstate commerce (Item 46, Schedule C, Page 3 of Return)				
5. Receipts from profession or vocation or personal services				
6. Receipts from interest on bank deposits, notes, bonds, loans, etc.				
7. Receipts from dividends on stocks of domestic and foreign corporations				
8. Receipts from royalties				
9. Receipts from premiums received in and from risks in New York City from the business of insurance				
10. Other receipts from commercial activities (Explain in Schedule D)				
11. Total gross receipts to be used as a measure in computing the tax (Items 1 to 10, inclusive) (If this return is for a period less than one year, complete but do not submit below, Items 13 to 18, inclusive)			1 109 239 96	
12. Tax due the City of New York (1/10 of 1% of Item 11)			1 109 [illegible]	
13. Penalties and/or Interest (See Instruction Sheet) June 15, 1940 to June 15, 1943 2¼ 03			66 [illegible]	
14. Total tax, penalties and/or interest (Item 12 plus Item 13)			1 [illegible]	

COMPUTATION OF TAX BASED ON A RETURN FOR A PERIOD LESS THAN ONE YEAR (SEE INSTRUCTION SHEET)

15. Total gross receipts (Item 11)				
16. Number of days covered by this return (Period shown above)				Days
17. Total gross receipts (on a per annum basis) to be used as a measure in computing the tax (Item 15 multiplied by 365 and the product thereof divided by Item 16)				
18. Tax due the City of New York (1/10 of 1% of Item 17)				
19. Penalties and/or Interest (See Instruction Sheet)				
20. Total tax, penalties and/or interest (Item 18 plus Item 19)				

LOCATIONS OF BOROUGH OFFICES OF THE BUREAU OF CITY COLLECTIONS

MANHATTAN ..... Room 109, Municipal Building
THE BRONX ..... Tremont and Arthur Avenues
BROOKLYN ..... Room 1, Municipal Building
QUEENS ..... Court Square, Long Island City
RICHMOND ..... Room 12, Borough Hall, St. George, S. I.

MAKE CHECKS PAYABLE TO CITY COLLECTOR

Cashier's Stamp 32-219

JA 1941 A80639 RECPAY Check — [illegible]

Receipt or Payment Will Be Endorsed or Marked in This Space. Do Not Accept Hand-written Receipts.

2/1
90

SCHEDULE A

ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SALES IN INTERSTATE COMMERCE

(TO BE USED BY PERSONS HAVING RECEIPTS FROM SALES IN INTERSTATE COMMERCE)

Item No.	RECEIPTS	Amount
21.	Gross receipts from sales (Less: Sales returned)	$
22.	Less—Receipts from sales in foreign countries, (Less: Sales returned) (Explain in Schedule E)	$
23.	Non-allocable and non-taxable receipts (Less: Sales returned) (Explain in Schedule E)	$
24.	Wholly taxable and allocable receipts (Item 21 minus Items 22 and 23)	$
25.	Less—Wholly taxable receipts (Enter as Item 1, Page 1 of Return)	
26.	Allocable receipts (Receipts from sales in interstate commerce subject to allocation) (Item 24 minus Item 25)	$

IMPORTANT

Before proceeding further, answer the following questions:

(a) Is your entire real and tangible personal property located wholly within New York City?

(b) Are the wages, salaries and other personal service compensation paid during the year by you wholly applicable to employees who work in, or from, or are attached to, your place of business in New York City?

If your answers to both questions are "Yes", then you need not submit the information requested in Items 27 to 31, inclusive, and you need not prepare Schedule B. In such event, insert a percentage of 66⅔% in the space provided under Item 32 and compute Item 33 as indicated therein.

Answer "Yes" or "No"

Answer "Yes" or "No"

	Divide (a) by (b) to obtain percentage		
27.	(a) Average real and tangible personal property within New York City	$	
	(b) Average real and tangible personal property within the United States	$	
28.	(a) Wages, salaries and other personal service compensation in New York City	$	%
	(b) Wages, salaries and other personal service compensation in the United States	$	
29.	(a) Wholly taxable receipts (Item 25) plus 1/3 of allocable receipts (1/3 of Item 26)	$	%
	(b) Wholly taxable and allocable receipts (Item 24)	$	
30.	Total percentages (Items 27 to 29, inclusive)		%
31.	Average percentage (Item 30 divided by three)		%
32.	Percentage to be used in computing allocated receipts subject to tax (Indicate below percentage applicable):		
	Average percentage, as per Item 31		
	If average percentage exceeds 66⅔%, use 66⅔%		%
	If average percentage is less than 33⅓%, use 33⅓%		
33.	Computation of allocated receipts subject to tax:		
	Allocable receipts (Item 26) multiplied by Item 32 (Enter as Item 2, Page 1 of Return)		$

SCHEDULE B

AVERAGE VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY EMPLOYED IN BUSINESS

	Description of Property	TOTAL Real and Tangible Personal Property Owned and Rented, Wherever Situated	Real and Tangible Personal Property Situated Within the City of New York	Real and Tangible Personal Property Situated Within the City of New York	
				Amount	City or Town and State
34.	Real estate (See note below)	$	$	$	
35.	Machinery				
36.	Motor vehicles and other delivery equipment				
37.	Merchandise inventory				
38.	Other tangible personal property				
39.	Total real and tangible personal property (Items 34 to 38, inclusive) (Enter as Item 27)	$	$	$	

NOTE.—Real property within the City of New York shall include all property subject to tax as real estate under the Tax Law of the State of New York.

2/2

SCHEDULE C
ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SERVICES IN INTERSTATE COMMERCE

(TO BE USED BY PERSONS HAVING RECEIPTS FROM SERVICES IN INTERSTATE COMMERCE WHERE MILEAGE IS EMPLOYED AS A BASIS IN DETERMINING THE RATES CHARGED FOR SERVICES RENDERED)

Item No.		
60.	Gross receipts from passenger service	
61.	Gross receipts from freight service	
62.	Total (Item 60 plus Item 61)	
63.	Less—Receipts in foreign commerce (Explain in Schedule E)	
64.	Non-allocable and non-taxable receipts (Explain in Schedule E)	
65.	Wholly taxable and allocable receipts (Item 62 minus Items 63 and 64)	
66.	Less—Wholly taxable receipts (Enter as Item 3, Page 1 of Return)	
67.	Allocable receipts (Receipts from services in interstate commerce subject to allocation) (Item 65 minus Item 66)	

COMPUTATION OF ALLOCATED RECEIPTS SUBJECT TO TAX

List Each Interstate Route Separately	Total Route Miles in the United States	Route Miles in New York State	Percentage to Be Used in Allocating Receipts	Revenue from Route: Allocable Receipts	Revenue from Route: Allocated Receipts Subject to Tax
			%		
			%		
			%		
			%		
			%		
			%		
			%		
			%		
			%		
			%		
			%		
			%		
Enter total allocated receipts as Item 4, Page 1 of Return					

Remarks:

SCHEDULE D
DETAILS OF ITEM 10, PAGE 1 OF RETURN

EXPLANATION	Amount

Remarks:

Form 40B

SCHEDULE E

EXPLAIN HEREINBELOW THE DEDUCTIONS TAKEN AS ITEMS 22, 23, 43 AND 44, AND ANY OTHER ITEMS EXCLUDED FROM TAXABLE RECEIPTS ON PAGE 1 OF RETURN

Nature of Receipt	Reason for Deduction or Exclusion from Gross Receipts	Amount
		$
		$

ANSWER ALL OF THE FOLLOWING QUESTIONS

The books of the taxpayer are in the care of Taxpayer

Located at 17 State Street, New York City

Was a return filed under Local Law No. 20 of 1939? Yes

If so, give name and address under which said return was filed Same

Is this business in any way an outgrowth, result, continuation or reorganization of a business or businesses existence prior to the date shown on Page 1 of the return? No If answer is "Yes", give name and address of such predecessor business and the date of the change in entity

Was the present business discontinued prior to June 30, 1940? No

If answer is "Yes", give date when operations were discontinued

Was the business legally dissolved? Date of dissolution

Remarks:

If this return was prepared by some person other than the taxpayer, an officer, partner or employee of the taxpayer, the following affidavit must be executed:

I/we swear (or affirm) that I/we prepared this return for the person or persons named herein and that the return (including any accompanying schedules) is a true, correct and complete statement of all the information with respect to the business tax liability of the person or persons for whom this return has been prepared of which I/we have any knowledge.

Sidney Fenton

Signature of person preparing this return

David Lowitz & Company

Name of firm

Sworn to and subscribed before me

this 16 day of June, 1941

Stanley Olins

Signature of officer administering oath

Notary Public, New York County

N.Y. Co. Clk's No. 30 Reg. No. 2-0-114

Commission Expires March 30, 1943

AFFIDAVIT OF TAXPAYER

I swear (or affirm) that this return, including the accompanying schedules and statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 105 of 1939 and the regulations issued under authority thereof.

John T. Clark & Son

Name of Taxpayer

Signature of Taxpayer

Agent or officer of corporation, partnership, etc.

Pres.

Title

Sworn to and subscribed before me

this 16 day of June, 1941

Stanley Olins

Signature of officer administering oath

Notary Public, New York County

N.Y. Co. Clk's No. 30 Reg. No. 2-0-114

Commission Expires March 30, 1943

2/4

90c

[fol. 91] John T. Clark & Sons, 17 State St., New York, N. Y.

June 14, 1941.

City Collector, Department of Finance, Room 100, Municipal Building, New York, New York

DEAR SIR:

Enclosed herewith is my return of excise tax on gross receipts (Form 40 B) for the calendar year 1939, together with my check to your order in the amount of $1,109.22, in full payment of the tax shown due on the return. I wish to reserve my rights to recover all or any portion of such payment, and, accordingly, make such payment under protest and solely for the purpose of avoiding the imposition of any penalties and the waiver of any rights which I might otherwise have. In addition thereto the following grounds of protest are asserted.

1. Local Law 103 of 1939, under which said tax is assessed, is in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States in that it purports to tax receipts of the taxpayer derived from sales in interstate and foreign commerce and thus constitutes a burden on interstate and foreign commerce.

2. Said local law is in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, [fol. 92] Section 6 of the Constitution of the State of New York in that it deprives me of property without due process of law.

3. Said local law is invalid in that it delegates to the Comptroller of the City of New York power and authority to establish rules and regulations and/or methods of allocation and evaluation of receipts derived from transactions in interstate and foreign commerce.

4. Said local law is in violation of the Enabling Act, Laws of 1934, Chapter 873, as amended, in that it purports to authorize the imposition of a tax on transactions originating and/or consummated outside of the territorial limits of the City of New York.

5. The rules and regulations and methods of allocation and evaluation adopted by the Comptroller of the City of New York in the Regulations promulgated by him as of

April 1, 1939, and said regulations as amended, purporting to be under and pursuant to said local law, are arbitrary, confiscatory and reasonable, and are contrary to the provisions of said local law and operate to deprive me of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York.

6. The Enabling Act, Laws of 1934, Chapter 873, as amended, purporting to grant authority to the City of New York to enact said local law is invalid and contrary to Article I, Section 8, Clause 3 and to the Fourteenth Amendment of the Constitution of the United States and Article I, [fol. 93] Section 6 of the Constitution of the State of New York in that it purports to authorize the imposition of a tax based upon the gross receipts of a person doing business in the City of New York.

7. Moreover it is the taxpayer's contention that its income as stevedore is tax exempt as interstate or foreign commerce in accordance with Puget Sound Stevedoring Co. v. Tax Commission of State of Washington et al. ('37), 302 U. S. 90, 58 Sup. Ct. 72.

Very truly yours, —— ——.

(Here follow 4 Photolithographs, side folios 94, 94a, 94b, 94c)

Taxpayer's Exhibit 3 in Evidence.

PAID UNDER PROTEST

Form 41B-41038-31441 (114) Page 1 of Returns

THE CITY OF NEW YORK—DEPARTMENT OF FINANCE—EMERGENCY REVENUE DIVISION
50 LAFAYETTE STREET, NEW YORK CITY—WOrth 2-4780

THE TAX DUE ON THIS RETURN IS PAYABLE ON JUNE 16, 1941.
NOTE—A person who is required to file a return for a basis period beyond May 1, 1941 may file such return on or before August 1, 1941 and pay the tax due at such time.

MAKE CHECK, DRAFT OR MONEY ORDER PAYABLE TO CITY COLLECTOR

Mail this Return with Remittance to the City Collector On or Before the Due Date.

RETURN OF EXCISE TAX ON GROSS RECEIPTS
(Pursuant to Local Law No. 78 of 1940)

Local Law No. 78 of 1940 (Chapter 41-B of the Administrative Code) imposes a tax to raise revenue for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment.

GROSS RECEIPTS FOR THE CALENDAR YEAR 1940

or Period Began ..... 19 ..... and Ended ..... 19 .....

PRINT NAME, ADDRESS AND FILE NUMBER

JOHN T CLARK & SON B-142992
17 STATE ST
NEW YORK N Y

TAXPAYER'S 3
2/1143 M2

FOR DEPARTMENTAL USE ONLY

Bus. Code .....
Pay. Code .....
Refer to Line .....
Tax Due $ .....
Tax Paid .....
Balance $ .....
Penalty .....
Total $ .....
Checked by .....
Bill No. .....
Billed by .....

KIND OF BUSINESS Stevedoring
(Indicate clearly type of business, for example: Manufacturer—Ladies' Dresses; Wholesale Furniture; Automobile Service Station; etc.)

DATE BUSINESS COMMENCED March 1910

Item No.	GROSS RECEIPTS				
1.	Wholly taxable receipts from sales in trade or business (Less: Sales returned)	$			
2.	Allocated receipts from sales in interstate commerce (Item 28—Schedule A or Item 54—Schedule C)				
3.	Wholly taxable receipts from trade or business of a service nature (Not from profession, vocation, etc.)			1 434 394	69
4.	Allocated receipts from services (traffic) in interstate commerce (Item 64—Schedule D)				
5.	Receipts from profession or vocation or personal services				
6.	Receipts from interest on bank deposits, notes, bonds, loans, etc.			85	12
7.	Receipts from dividends on stocks of domestic and foreign corporations				
8.	Receipts from royalties, rentals of personal property, etc.				
9.	Receipts from premiums received by an insurance company from risks in New York City				
10.	Receipts from commissions earned as insurance agent, insurance broker or insurance underwriter				
11.	Other receipts from commercial activities (Attach schedule)				
12.	Total gross receipts to be used as a measure in computing the tax (Items 1 to 11, inclusive)	$		1 434 479	81
13.	Tax due the City of New York (1/10 of 1% of Item 12)	$		1 434	48
14.	Penalty and/or interest				
15.	Total tax, penalties and/or interest (Item 13 plus Item 14)	$		1 434	48

DESK AUDITED.
SEP 3 1941
ACCEPTED L H B.

AFFIDAVIT

I swear (or affirm) that this return of gross receipts, including the accompanying schedules or statements, has been examined by me, and is to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 78 of 1940 and the regulations issued under authority thereof.

Sworn to and subscribed before me this 11th day of June 194[illegible]

Stanley Oliver
Signature of officer administering oath
STANLEY OLIVER
Notary Public, New York County
N.Y. Co. Clk's No. 30 Reg. No. 3-O-114
My commission expires March 30, 1943

John T. Clark & Son
Name of Business or Taxpayer

[signature]
Agent or officer if corporation, trustee, etc.

Pres.
Title

LOCATION OF BOROUGH OFFICES OF THE BUREAU OF CITY COLLECTIONS

MANHATTAN ..... Room 109, Municipal Building
THE BRONX ..... Tremont and Arthur Avenues
BROOKLYN ..... Room 1, Municipal Building
QUEENS ..... Borough Hall, Kew Gardens
RICHMOND ..... Room 12, Borough Hall, St. George, S. I.

53118 Cashier's Stamp

JUN 17 41 F 53118 RECDPAY Check $1,434.48

32 63

94

Form 41B

SCHEDULE A

Page 2 of Return

ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SALES IN INTERSTATE COMMERCE

(TO BE USED BY PERSONS HAVING RECEIPTS FROM SALES IN INTERSTATE COMMERCE)

Item No.			
16.	Gross receipts from sales (Less: Sales returned)		$
17.	Less—Receipts from sales in foreign commerce (Less: Sales returned) (Explain in Schedule E)	$	
18.	Non-allocable and non-taxable receipts (Less: Sales returned) (Explain in Schedule E)		$
19.	Wholly taxable and allocable receipts (Item 16 minus Items 17 and 18)		$
20.	Less—Wholly taxable receipts (*Enter as Item 1, Page 1 of Return*)		$
21.	Allocable receipts (Receipts from sales in interstate commerce subject to allocation) (Item 19 minus Item 20)		$

IMPORTANT

Before proceeding further, answer the following questions:

(a) Is the taxpayer's entire real and tangible personal property located wholly within New York City?

(b) Are the wages, salaries and other personal service compensation paid during the basic period (measuring period) covered by return wholly applicable to employees who work in, or from, or are attached to, the taxpayer's place of business in New York City?

Answer "Yes" or "No"

If the answers to both questions are "Yes", then the information requested in Items 22 to 26, inclusive, need not be submitted and Schedule B need not be prepared. In such event, insert a percentage of 66-2/3% in the space provided under Item 27 and compute Item 28 as indicated thereunder.

Answer "Yes" or "No"

	Divide (a) by (b) to obtain percentage		
22.	(a) Average real and tangible personal property within New York City (Per Schedule B)	$	%
	(b) Average real and tangible personal property within the United States (Per Schedule B)	$	
23.	(a) Wages, salaries and other personal service compensation in New York City	$	%
	(b) Wages, salaries and other personal service compensation in the United States	$	
24.	(a) Wholly taxable receipts (Item 20) plus 1/3 of allocable receipts (1/3 of Item 21)	$	%
	(b) Wholly taxable and allocable receipts (Item 19)	$	
25.	Total percentages (Items 22 to 24, inclusive)		%
26.	Average percentage (Item 25 divided by three)		%
27.	Percentage to be used in computing allocated receipts subject to tax (Indicate below percentage applicable):		
	Average percentage, as per Item 26		
	If average percentage exceeds 66-2/3%, use 66-2/3%		%
	If average percentage is less than 33-1/3%, use 33-1/3%		
28.	Computation of allocated receipts subject to tax:		
	Allocable receipts (Item 21) multiplied by Item 27 (*Enter as Item 2, Page 1 of Return*)		$ 0

SCHEDULE B

AVERAGE VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY EMPLOYED IN BUSINESS

	Description of Property	TOTAL Real and Tangible Personal Property Employed Within the United States	Real and Tangible Personal Property Employed Within the City of New York	Real and Tangible Personal Property Employed Within the United States But Without the City of New York	
				Amount	City or Town and State
29.	Real estate	$	$	$	
30.	Machinery				
31.	Motor vehicles and other delivery equipment				
32.	Merchandise inventory				
33.	Other tangible personal property				
34.	Total real and tangible personal property (Items 29 to 33, inclusive) (Enter as Item 22)	$	$	$	

ALTERNATIVE ALLOCATION FORMULA FOR MANUFACTURERS

If the taxpayer is a MANUFACTURER ENGAGED IN MANUFACTURING GOODS IN THE CITY OF NEW YORK for sale in interstate commerce, said taxpayer may, at his option, allocate the receipts from sales in interstate commerce on the basis of the cost of manufacturing and selling the goods sold in interstate commerce. A taxpayer who, at his option, elects to allocate the receipts from sales in interstate commerce under the alternative formula should prepare Schedule C, Page 3 of Return, and answer all questions indicated thereunder.

3/2

SCHEDULE C

MANUFACTURER'S ALTERNATIVE ALLOCATION FORMULA

(TO BE USED BY PERSONS ENGAGED IN MANUFACTURING GOODS IN THE CITY OF NEW YORK FOR SALE IN INTERSTATE COMMERCE)

Item No.		
35.	Gross receipts from sales (Less: Sales returned)	$
36.	Less—Receipts from sales in foreign commerce (Less: Sales returned) (Explain in Schedule E)	$
37.	Non-allocable and non-taxable receipts (Less: Sales returned) (Explain in Schedule E)	$
38.	Wholly taxable and allocable receipts (Item 35 minus Items 36 and 37)	$
39.	Less—Wholly taxable receipts (*Enter as Item 1, Page 1 of Return*)	$
40.	Allocable receipts (Receipts from sales in interstate commerce subject to allocation) (Item 38 minus Item 39)	$

IMPORTANT

A taxpayer may concede that the apportioned manufacturing and selling cost exceeds 66-2/3% of the allocable receipts. If it is so conceded, the information requested in Items 41 to 52, inclusive, need not be submitted. In such event, compute 66-2/3% of Item 40 and insert the resulting figure under Item 53. The amount of allocated receipts subject to tax is then to be computed as indicated by Item 54.

COMPUTATION OF ALLOCATION BASE

	Manufacturing and selling cost of all goods sold during basic period:	
41.	Materials and supplies consumed	$
42.	Factory and contractor labor	
43.	Factory overhead	
44.	Other expenses incurred in the manufacturing process	
45.	Shipping and delivery expenses (Including salaries and wages)	
46.	Advertising expense	
47.	Salesmen's salaries, commissions and traveling expenses	
48.	Other expenses incurred in selling or shipping the goods to customers	
49.	Total manufacturing and selling cost (Items 41 to 48, inclusive)	$
50.	Percentage which allocable receipts bear to gross receipts from sales (Item 40 divided by Item 35)	%
51.	Manufacturing and selling cost apportioned to allocable receipts (Item 49 multiplied by Item 50)	$
52.	Maximum placed on manufacturing and selling cost apportioned to allocable receipts—66-2/3% of allocable receipts (66-2/3% of Item 40)	$

COMPUTATION OF ALLOCATED RECEIPTS SUBJECT TO TAX

53.	Allocation base to be used in computing allocated receipts subject to tax (Item 51 or Item 52, whichever is lower)	$
54.	Allocated receipts subject to tax—50% of Item 53 (*Enter as Item 2, Page 1 of Return*)	$

A TAXPAYER USING THE MANUFACTURER'S ALTERNATIVE FORMULA (SCHEDULE C) MUST ANSWER THE FOLLOWING QUESTIONS

A. Describe the type of raw materials purchased for consumption in the manufacturing process

B. Are all such raw materials purchased in the name of the taxpayer?

C. Is the entire manufacturing process performed on the taxpayer's premises in New York City?

D. Is any part of the manufacturing process performed by a contractor?

E. Does the taxpayer maintain a factory, plant or warehouse outside New York City?

If answer is "Yes", state location and other pertinent details:

F. Describe fully the manufacturing process (or processes):

G. Describe the products manufactured:

H. Are all manufactured goods shipped to customers from the taxpayer's premises in New York City?

If answer is "No", state the various points from which shipments are made to customers:

(If more space is required, attach separate schedule)

3/3

SCHEDULE D

ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SERVICES (TRAFFIC) IN INTERSTATE COMMERCE

(TO BE USED BY PERSONS HAVING RECEIPTS FROM SERVICES (TRAFFIC) IN INTERSTATE COMMERCE WHERE MILEAGE IS EMPLOYED AS A BASIS IN DETERMINING THE RATES CHARGED FOR SERVICES RENDERED)

Item No.			
55.	Gross receipts (revenue) from passenger service	$	
56.	Gross receipts (revenue) from freight service		
57.	Gross receipts (revenue) from other traffic		
58.	Total (Items 55 to 57, inclusive)		$
59.	Less—Receipts in foreign commerce (Explain in Schedule E)	$	
60.	Non-allocable and non-taxable receipts (Explain in Schedule E)		$
61.	Wholly taxable and allocable receipts (Item 58 minus Items 59 and 60)		$
62.	Less—Wholly taxable receipts (*Enter as Item 3, Page 1 of Return*)		$
63.	Allocable receipts (Receipts from services in interstate commerce subject to allocation) (Item 61 minus Item 62)		$

64. **COMPUTATION OF ALLOCATED RECEIPTS SUBJECT TO TAX**

List Each Interstate Route Separately	Total Route Miles in the United States	Route Miles in New York State	Percentage to Be Used in Allocating Receipts	Revenue from Route: Allocable Receipts	Revenue from Route: Allocated Receipts Subject to Tax
			%	$	$
Enter total allocated receipts as Item 4, Page 1 of Return				$	$

(If more space is required, attach separate schedule)

SCHEDULE E

EXPLAIN HEREINBELOW THE DEDUCTIONS TAKEN AS ITEMS 17, 18, 36, 37, 59 AND 60, AND ANY OTHER ITEMS EXCLUDED FROM TAXABLE RECEIPTS ON PAGE 1 OF RETURN

Nature of Receipt	Reason for Deduction or Exclusion from Gross Receipts	Amount
		$
		$

THE FOLLOWING QUESTIONS MUST BE ANSWERED

I. State whether taxpayer is a corporation, co-partnership, individual proprietor, etc. Corporation

II. The books of the taxpayer are in the care of Taxpayer

Located at 27 State Street, New York City

III. Were returns filed under prior Business Tax laws? Yes If so, give name and address under which such returns were filed

If no returns were filed, state reasons therefor

IV. Is this business in any way an outgrowth, result, continuation or reorganization of a business previously in existence? No

If so, give details including the date of the change and the name and address of the predecessor business

V. Is the present business still in existence? Yes If not, give the exact date business activities terminated

Was the business legally dissolved? If so, give date of dissolution

3/4

[fol. 95] John T. Clark & Sons, 17 State St., New York, N. Y.

June 14, 1941.

City Collector, Department of Finance, Room 100, Municipal Building, New York, New York

Dear Sir:

Enclosed herewith is my return of excise tax on gross receipts (Form 41 B) for the calendar year 1940, together with my check to your order in the amount of $1,434.48, in full payment of the tax shown due on the return. I wish to reserve my rights to recover all or any portion of such payment, and, accordingly, make such payment under protest and solely for the purpose of avoiding the imposition of any penalties and the waiver of any rights which I might otherwise have. In addition thereto the following grounds of protest are asserted.

1. Local Law 78 of 1940, under which said tax is assessed, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States in that it purports to tax receipts of the taxpayer derived from sales in interstate and foreign commerce and thus constitutes a burden on interstate and foreign commerce.

2. Said local law is in violation of the Fourteenth Amendment to the Constitution of the United States and Article [fol. 96] I, Section 6 of the Constitution of the State of New York in that it deprives me of property without due process of law.

3. Said local law is invalid in that it delegates to the Comptroller of the City of New York power and authority to establish rules and regulations and/or methods of allocation and evaluation of receipts derived from transactions in interstate and foreign commerce.

4. Said local law is in violation of the Enabling Act, Laws of 1934, Chapter 873, as amended in that it purports to authorize the imposition of a tax on transactions originating and/or consummated outside of the territorial limits of the City of New York.

5. The rules and regulations and methods of allocation and evaluation adopted by the Comptroller of the City of New York in the Regulations promulgated by him as of

April 1, 1939, and said regulations as amended, purporting to be under and pursuant to said local law, are arbitrary, confiscatory and unreasonable, and are contrary to the provisions of said local law and operate to deprive me of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York.

6. The Enabling Act, Laws of 1934, Chapter 873, as amended, purporting to grant authority to the City of New York to enact said local law is invalid and contrary to Article I, Section 8, Clause 3 and to the Fourteenth Amend-
[fol. 97] ment of the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York in that it purports to authorize the imposition of a tax based upon the gross receipts of a person doing business in the City of New York.

7. Moreover it is the taxpayer's contention that its income as stevedore is tax exempt as interstate or foreign commerce in accordance with Puget Sound Stevedoring Co. v. Tax Commission of State of Washington et al. ('37), 302 U. S. 90, 58 Sup. Ct. 72.

Very truly yours, —— ——.

(Here follow 4 Photolithographs, side folios 98, 98a, 98b, 98c)

Taxpayer's Exhibit 4 in Evidence

Form 426 4638-20443 114

Page 1 of Return

THE TAX DUE ON THIS RETURN IS PAYABLE ON JUNE 15, 1942.

NOTE—A taxpayer who began business after May 1, 1941, and is required to file a return for a basis period extending beyond May 1, 1942, may file such return on or before August 1, 1942, and pay the tax due at such time.

Mail this Return with Remittance to the City Collector On or Before the Due Date.

Such payments must be made only to the Cashier at the window. Such payments must be presented before 3 o'clock P.M., September 15 M. When payment is made the Cashier receipts thereto by a stamp in the space provided hereon.

THE CITY OF NEW YORK—DEPARTMENT OF FINANCE

90 LAFAYETTE STREET, NEW YORK CITY—WOrth 2-4700

GENERAL BUSINESS AND FINANCIAL TAX RETURN

(Return of Excise Tax on Gross Receipts Pursuant to Local Law No. 47 of 1941)

GROSS RECEIPTS FOR THE CALENDAR YEAR 1941

or Period Began ..... 19..... and Ended ..... 19.....

PRINT NAME, ADDRESS AND REGISTRATION OR FILE NUMBER

JOHN T CLARK & SON
17 STATE ST
NEW YORK N Y

B-142992

MAIL THIS COPY WITH CHECK

PAYEE'S EXHIBIT # 4

2/1/43 N2

Please correct any error in above imprint

FOR DEPARTMENTAL USE ONLY

I.
T.D. $
T.P.
B. $
6P
6UR
T. $
Checked by
B.C.
P.C.
B. No.
Billed by

KIND OF BUSINESS STEVEDORING
(Indicate clearly type of business, for example: Manufacturer—Ladies' Dresses; Wholesale Furniture; Automobile Service Station; etc.)

DATE BUSINESS COMMENCED MARCH 1910

Item No.	GROSS RECEIPTS				
1.	Wholly taxable receipts from sales in trade or business, less sales returns	$			
2.	Allocated receipts from sales in interstate commerce (Item 28—Schedule A or Item 54—Schedule C)				
3.	Wholly taxable receipts from trade or business of a service nature (Not from profession, vocation, etc.)		2	693 182	59
4.	Allocated receipts from transportation services in interstate commerce (Item 64—Schedule D)				
5.	Receipts from profession or vocation or personal services				
6.	Receipts from interest on bank deposits, notes, bonds, loans, etc.				
7.	Receipts from dividends on stocks of domestic and foreign corporations				
8.	Receipts from royalties, rentals of personal property, etc.				
9.	Receipts from premiums received by an insurance company from risks in New York City				
10.	Receipts from commissions earned as insurance agent, insurance broker or insurance underwriter				
11.	Other receipts from commercial activities (Attach schedule)				
12.	Total taxable receipts to be used as a measure in computing the tax, Items 1 to 11, inclusive	$	2	693 182	59
13.	Tax due the City of New York—1/20 of 1% of Item 12	$		1 346	59
14.	Penalties and/or interest				
15.	Total tax, penalties and/or interest, Item 13 plus Item 14	$		1 346	59

MAKE CHECK, DRAFT OR MONEY ORDER PAYABLE TO THE CITY COLLECTOR

AFFIDAVIT

I swear (or affirm) that this return of gross receipts, including the accompanying schedules or statements, has been examined by me, and is, to the best of my knowledge and belief, a true and complete return, made in good faith, for the period stated, pursuant to Local Law No. 47 of 1941 and the regulations issued under authority thereof.

Sworn to and subscribed before me

this 12 day of January, 1942.

JOHN T. CLARK & SON
Name of Business or Taxpayer

NOTARY PUBLIC, Queens Co. Clk's No. 1262, Reg. No. 4H-2249
My commission expires March 30, 1942

Title

Cashier's Stamp

JAN 15 42 RECD PAY Check $1,346.59

22 95

LOCATION OF BOROUGH OFFICES OF THE CITY COLLECTOR

MANHATTAN ..... Room 160, Municipal Building
THE BRONX ..... Tremont and Arthur Avenues
BROOKLYN ..... Room 1, Municipal Building
QUEENS ..... Borough Hall, Kew Gardens
RICHMOND ..... Room 12, Borough Hall, St. George, S. I.

4/1.

98

Form 42B

SCHEDULE A

Page 2 of Return

ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM SALES IN INTERSTATE COMMERCE

(TO BE USED BY A TAXPAYER HAVING RECEIPTS FROM SALES IN INTERSTATE COMMERCE)

Item No.			
16.	Gross receipts from sales, less sales returns		$
17.	Deduct—Receipts from sales in foreign commerce, less sales returns (Explain in Schedule E)	$	
18.	Non-allocable and non-taxable receipts, less sales returns (Explain in Schedule E)		$
19.	Wholly taxable and allocable receipts (Item 16 minus Items 17 and 18)		$
20.	Deduct—Wholly taxable receipts. *Enter as Item 1, Page 1 of Return*		
21.	Allocable receipts (Receipts from sales in interstate commerce subject to allocation) (Item 19 minus Item 20)		$

IMPORTANT

Before proceeding further, answer the following questions:

(a) Is the taxpayer's entire real and tangible personal property located wholly within New York City? _____ Answer "Yes" or "No"

(b) Are the wages, salaries and other personal service compensation paid during the basic period (measuring period) covered by return wholly applicable to employees who work in, or from, or are attached to, the taxpayer's place of business in New York City? _____ Answer "Yes" or "No"

If the answers to both questions are "Yes," then the information requested in Items 22 to 26, inclusive, need not be submitted and Schedule B need not be prepared. In such event, insert a percentage of 66-2/3% in the space provided under Item 27 and compute Item 28 as indicated thereunder.

	Divide (a) by (b) to obtain percentage		
22.	(a) Average real and tangible personal property within New York City (Per Schedule B)	$	%
	(b) Average real and tangible personal property within the United States (Per Schedule B)	$	
23.	(a) Wages, salaries and other personal service compensation in New York City	$	%
	(b) Wages, salaries and other personal service compensation in the United States	$	
24.	(a) Wholly taxable receipts (Item 20) plus 1/3 of allocable receipts (1/3 of Item 21)	$	%
	(b) Wholly taxable and allocable receipts (Item 19)	$	
25.	Total percentages (Items 22 to 24, inclusive)		%
26.	Average percentage (Item 25 divided by three)		%

27. Percentage to be used in computing allocated receipts subject to tax. Indicate below the percentage applicable:

Average percentage, as computed in Item 26 above

If the average percentage computed as Item 26 is greater than 66-2/3%, use 66-2/3%

If the average percentage computed as Item 26 is less than 33-1/3%, use 33-1/3% — _____ %

28. Computation of allocated receipts subject to tax:

Allocable receipts (Item 21) multiplied by Item 27. *Enter as Item 2, Page 1 of Return* — $

SCHEDULE B

AVERAGE VALUE OF REAL AND TANGIBLE PERSONAL PROPERTY EMPLOYED IN BUSINESS

(TO BE USED ONLY BY A TAXPAYER COMPLETING ITEM 22)

	Description of Property	TOTAL Real and Tangible Personal Property Employed Within the United States	Real and Tangible Personal Property Employed Within the City of New York	Real and Tangible Personal Property Employed Within the United States But Without the City of New York	
				Amount	City or Town and State
29.	Real estate	$	$	$	
30.	Machinery, fixtures, etc.				
31.	Motor vehicles and other delivery equipment				
32.	Merchandise inventory				
33.	Other tangible personal property				
34.	Total real and tangible personal property (Items 29 to 33, inclusive). *Enter as Item 22*	$	$	$	

MANUFACTURER'S ALTERNATIVE ALLOCATION FORMULA

If the taxpayer is a manufacturer engaged in manufacturing goods in the City of New York, such taxpayer may, at his option, allocate the receipts from sales in interstate commerce on the basis of the cost of manufacturing and selling the goods sold in interstate commerce. A taxpayer who, at his option, elects to allocate the receipts from sales in interstate commerce under the alternative formula should prepare Schedule C, Page 3 of Return, and answer all questions indicated thereunder. Under such circumstances, Schedules A and B need not be prepared.

4/2

Form 4SB

Page 3 of Return

SCHEDULE C

MANUFACTURER'S ALTERNATIVE ALLOCATION FORMULA

(TO BE USED ONLY BY A NEW YORK CITY MANUFACTURER WHEN MAKING AN ALLOCATION OF RECEIPTS FROM SALES IN INTERSTATE COMMERCE)

Item No.			
36.	Gross receipts from sales, less sales returns		$
5.	Deduct—Receipts from sales in foreign commerce, less sales returns (Explain in Schedule E)	$	
37.	Non-allocable and non-taxable receipts, less sales returns (Explain in Schedule E)		$
38.	Wholly taxable and allocable receipts (Item 33 minus Items 36 and 37)		$
39.	Deduct—Wholly taxable receipts. *Enter as Item 1, Page 1 of Return*		$
40.	Allocable receipts (Receipts from sales in interstate commerce subject to allocation) (Item 38 minus Item 39)		$

IMPORTANT

A taxpayer may contend that the apportioned manufacturing and selling cost exceeds 66-2/3% of the allocable receipts. If it is so contended, the information requested in Items 41 to 48, inclusive, need not be submitted. In such event, compute 66-2/3% of Item 40 and insert the resulting figure under Item 53. The amount of allocated receipts subject to tax is then to be computed as indicated by Item 54.

COMPUTATION OF ALLOCATION BASE

Manufacturing and selling cost of all goods sold during basic period:

41.	Materials and supplies consumed	$
42.	Factory and manufacturing labor	
43.	Factory overhead	
44.	Other expenses incurred in the manufacturing process	
45.	Advertising expense	
46.	Salesmen's salaries, commissions and traveling expenses	
47.	Shipping and delivery expenses, including salaries and wages	
48.	Other expenses incurred in selling or shipping the goods to customers	
49.	Total manufacturing and selling cost (Items 41 to 48, inclusive)	$
50.	Percentage which allocable receipts bear to gross receipts from sales (Item 40 divided by Item 36)	%
51.	Manufacturing and selling cost apportioned to allocable receipts (Item 49 multiplied by Item 50)	$
52.	Maximum placed on manufacturing and selling cost apportioned to allocable receipts—66-2/3% of allocable receipts (66-2/3% of Item 40)	$

COMPUTATION OF ALLOCATED RECEIPTS SUBJECT TO TAX

53.	Allocation base to be used in computing allocated receipts subject to tax (Item 51 or Item 52, whichever is lower)	$
54.	Allocated receipts subject to tax—30% of Item 53. *Enter as Item 2, Page 1 of Return*	$

A TAXPAYER USING THE MANUFACTURER'S ALTERNATIVE FORMULA (SCHEDULE C) MUST ANSWER THE FOLLOWING QUESTIONS

A. Describe the type of raw materials purchased for consumption in the manufacturing process:

B. Are all such raw materials purchased in the name of the taxpayer?

C. Is the entire manufacturing process performed on the taxpayer's premises in New York City?

D. Is any part of the manufacturing process performed by a contractor?

E. Does the taxpayer maintain a factory, plant or warehouse outside New York City?

If answer is "Yes," state location and other pertinent details:

F. Describe fully the manufacturing process (or processes):

G. Describe the product(s) manufactured:

H. Are all manufactured goods shipped to customers from the taxpayer's premises in New York City?

If answer is "No," state the various points from which shipments are made to customers:

(If more space is required, attach separate schedule)

4/3

98b

Form 428 — Page 4 of Return

SCHEDULE D

ALLOCATION AND APPORTIONMENT OF RECEIPTS FROM TRANSPORTATION SERVICES IN INTERSTATE COMMERCE

(TO BE USED BY A TAXPAYER HAVING RECEIPTS FROM TRANSPORTATION SERVICES IN INTERSTATE COMMERCE WHERE MILEAGE IS A FACTOR IN DETERMINING THE RATES CHARGED FOR SERVICES RENDERED. SCHEDULE D DOES NOT APPLY TO A PERSON SUBJECT TO THE NEW YORK CITY UTILITY TAX LAW)

Item No.		
55.	Gross receipts (revenue) from passenger service	$
56.	Gross receipts (revenue) from freight service	
57.	Gross receipts (revenue) from other traffic	
58.	Total (Items 55 to 57, inclusive)	$
59.	Deduct—Receipts in foreign commerce (Explain in Schedule E)	$
60.	Non-allocable and non-taxable receipts (Explain in Schedule E)	$
61.	Wholly taxable and allocable receipts (Item 58 minus Items 59 and 60)	$
62.	Deduct—Wholly taxable receipts. *Enter as Item 3, Page 1 of Return*	$
63.	Allocable receipts (Receipts from traffic in interstate commerce subject to allocation) (Item 61 minus Item 62)	$

64. **COMPUTATION OF ALLOCATED RECEIPTS SUBJECT TO TAX**

List Each Interstate Route Separately	Total Route Miles in the United States	Route Miles in New York State	Percentage to Be Used in Allocating Receipts	Revenue from Route: Allocable Receipts	Revenue from Route: Allocated Receipts Subject to Tax
			%	$	$

Enter total allocated receipts as Item 4, Page 1 of Return — $

(If more space is required, attach separate schedule)

SCHEDULE E

EXPLAIN HEREINBELOW THE DEDUCTIONS TAKEN AS ITEMS 17, 18, 38, 39, 39 AND 60. ALL ITEMS EXCLUDED FROM TAXABLE RECEIPTS ON PAGE 1 OF RETURN MUST ALSO BE EXPLAINED IN THIS SCHEDULE

Nature of Receipt	Reason for Deduction or Exclusion from Gross Receipts	Amount
		$
		$

THE FOLLOWING QUESTIONS MUST BE ANSWERED

I. State whether taxpayer is a corporation, partnership, individual proprietor, etc. CORPORATION

II. The books of the taxpayer are in the care of TAXPAYER

Located at 17 STATE STREET, N. Y. C.

III. Were General Business and Financial Tax Returns filed for prior years? YES

If not, state reason.

If returns for prior years were filed under any other name or address, give name and address used on such returns SAME

IV. Is this business in any way an outgrowth, result, continuation or reorganization of a business previously in existence? NO

If so, give details including the date of the change and the name and address of the predecessor business

V. Is the present business still in existence? YES If not, give the exact date business activities terminated

Was the business legally dissolved? If so, give date of dissolution

VI. Were returns filed under the New York City Sales and Compensating Use Tax Laws? NO

If not, state reason NOT SUBJECT

4/4

08

[fol. 99] John T. Clark & Son, 17 State St., New York, New York

June 12, 1942.

City Collector, Department of Finance, Room 100—Municipal Building, New York, New York.

Dear Sir:

Enclosed herewith is our return of excise tax on gross receipts (Form 42B) for the calendar year 1941, together with our check to your order in the amount of $1,346.59, in full payment of the tax shown due on the return. We wish to reserve our rights to recover all or any portion of such payment, and, accordingly, make such payment under protest and solely for the purpose of avoiding the imposition of any penalties and the waiver of any rights which we might otherwise have. In addition thereto the following grounds of protest are asserted:

1. Local Law 47 of 1941, under which said tax is assessed, is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States in that it purports to tax receipts of the taxpayer derived from sales in interstate and foreign commerce and thus constitutes a burden on interstate and foreign commerce.

2. Said local law is in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York in [fol. 100] that it deprives us of property without due process of law.

3. Said local law is invalid in that it delegates to the Comptroller of the City of New York power and authority to establish rules and regulations and/or methods of allocation and evaluation of receipts derived from transactions in interstate and foreign commerce.

4. Said local law is in violation of the Enabling Act, Laws of 1934, Chapter 873, as amended, in that it purports to authorize the imposition of a tax on transactions originating and/or consummated outside of the territorial limits of the City of New York.

5. The rules and regulations and methods of allocation and evaluation adopted by the Comptroller of the City of

New York in the Regulations promulgated by him as of April 1, 1939, and said regulations as amended, purporting to be under and pursuant to said local law, are arbitrary, confiscatory and unreasonable, and are contrary to the provisions of said local law and operate to deprive us of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States and Article I, Section 6 of the Constitution of the State of New York.

6. The Enabling Act, Laws of 1934, Chapter 873, as amended, purporting to grant authority to the City of New York to enact said local law is invalid and contrary to Article I, Section 8, Clause 3 and to the Fourteenth Amendment of the Constitution of the United States and Article I, Sec- [fol. 101] tion 6 of the Constitution of the State of New York in that it purports to authorize the imposition of a tax based upon the gross receipts of a person doing business in the City of New York.

7. Moreover it is the taxpayer's contention that its income as stevedore is tax-exempt as interstate or foreign commerce in accordance with *Puget Sound Stevedoring Co.* v. *Tax Commission of State of Washington et al.* ('37), 302 U. S. 90, 58 Sup. Ct. 72.

Very truly yours, John T. Clark & Son, by Wm. H. Clark.

[fol. 102] TAXPAYER'S EXHIBIT 5 IN EVIDENCE

(Stamp:) Received. Comptroller's Office, Chief Clerk, Jun. 12, 9:46 A. M. '42

[Letterhead of]

Baldwin, Todd & Young

June 11, 1942.

Comptroller of The City of New York, Municipal Building, New York, New York.

John T. Clark & Son, Applications for Refund of Excise Tax on Gross Receipts for the Years 1938, 1939 and 1940

DEAR SIR:

On behalf of our client, the above named corporation, we enclose herewith the following:

(1) Application for refund of excise tax on gross receipts for the calendar year 1938 in the sum of $879.94, together with interest of $105.59, or a total of $985.53.

(2) Application for refund of excise tax on gross receipts for the calendar year 1939 in the sum of $1,109.22, together with interest of $66.55, or a total of $1,175.77.

(3) Application for refund of excise tax on gross receipts for the calendar year 1940 in the sum of $1,434.48.

[fol. 103] In each case there is attached to the application the cancelled check of the corporation used in paying the tax and interest.

You will note that a hearing is requested.

Will you please acknowledge receipt of this letter and of the enclosed applications by signing and returning the copy of this letter which is enclosed for that purpose.

Very truly yours, Baldwin, Todd & Young.

JHA:LW.

7 Enclosures: 3 Applications for Refund of Tax, each with cancelled check attached. 1 Copy of this letter.

[fol. 104] Application by John T. Clark & Son to the Comptroller of the City of New York for Refund of Excise Tax on Gross Receipts for the Calendar Year 1938 and Interest Thereon

John T. Clark & Son hereby applies for refund of excise tax on gross receipts paid by it for the calendar year 1938 and of the interest thereon, and in support of said application sets forth the following:

1. John T. Clark & Son is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office or place of business at 17 State Street, New York, New York.

2. On or about June 16, 1941 John T. Clark & Son pursuant to New York City Local Law 20 of 1938 filed with the Collector of the City of New York a return of excise tax on gross receipts (Form 39B) for the calendar year 1938. Said return purported to show a tax due in the amount of $879.94, with interest thereon from June 15, 1939 to June 15, 1941 in the amount of $105.59, or a total tax and interest due of $985.53. Said return was filed under protest and duress and to avoid the imposition of penalties. The protest was in writing dated June 14, 1941, was attached to said return, and stated in detail the grounds of the protest. Payment of the tax was made at the time of filing the return. There is attached hereto the cancelled check of John. T. Clark & Son dated June 16, 1941 payable to the order of the City Collector, City of New York, in the amount of $985.53, used in making payment of such tax and interest.

[fol. 105] 3. On information and belief, said tax in the amount of $879.94 and said interest in the amount of $105.59 were erroneously, illegally or unconstitutionally collected and should be refunded for the following reasons:

(a) John T. Clark & Son is, and for many years prior to and including the year 1938 has been, engaged in the general stevedoring business. The business consists of the loading and/or unloading of ships and other vessels engaged exclusively in commerce between the United States and foreign countries and the entire gross receipts upon which said tax was exacted and paid were payments received for such loading and/or unloading. Such business of loading and/or unloading constitutes foreign commerce and the City of New York is without power to tax the privilege of doing it

by exacting in return therefor a percentage of the gross receipts derived therefrom.

(b) Part of the gross receipts with respect to which the tax was paid were received for loading and/or unloading ships and other vessels in harbors other than harbors of New York State and said part of such gross receipts were therefore received for the performance of acts outside of the territorial limits and jurisdiction of New York State and New York City.

(c) Part of the gross receipts with respect to which the tax was paid were received for the performance of acts on ships and other vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York.

(d) Said Local Law 20 of 1938 does not authorize the im-[fol. 106] position on John T. Clark & Son of a tax for the privilege of carrying on its business nor does it require John T. Clark & Son to include in gross receipts used as the measure of said tax any or all of its receipts from said business.

(e) If Local Law 20 of 1938 does authorize the imposition of a tax on John T. Clark & Son for the privilege of engaging in its business it is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, the Fourteenth Amendment to said Constitution, Article I, Section 6 of the Constitution of the State of New York, and the Enabling Act, New York Laws of 1934, Chapter 873, as amended.

(f) If the Enabling Act, New York Laws of 1934, Chapter 873, as amended, purports to grant authority to the City of New York to enact legislation authorizing the imposition of a tax upon John T. Clark & Son for the privilege of carrying on its business, said Act is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and of the Fourteenth Amendment to said Constitution and of Article I, Section 6 of the Constitution of the State of New York.

No hearing has been heretofore had with respect to the matters set forth herein and application is hereby made for a hearing.

John T. Clark & Son, by Wm. H. Clark, Pres.

[fol. 107] STATE OF NEW YORK,
County of New York, ss:

Wm. H. Clark, being duly sworn, says:

That he is President of John T. Clark & Son, the applicant above named, a corporation organized and existing under the laws of the State of New York, and that he has read the foregoing refund claim and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be made upon information and belief, and that as to those matters he believes it to be true.

Wm. H. Clark, Pres.

Sworn to before me this 11th day of June, 1942.
Stanley Oliver, Notary Public, New York County. N. Y. Co. Clk's No. 24, Reg. No. 4-O-54. Kings Co. Clk's No. 41, Reg. No. 4051. Bronx Co. Clk's No. 5, Reg. No. 32-O-44. Queens Co. Clk's No. 444, Reg. No. 2243. Certificate filed in Richmond Co. Commission expires March 30, 1944. (Seal.)

[fol. 108] Application by John T. Clark & Son to the Comptroller of the City of New York for Refund of Excise Tax on Gross Receipts for the Calendar Year 1939 and Interest Thereon

John T. Clark & Son hereby applies for refund of excise tax on gross receipts paid by it for the calendar year 1939 and of the interest thereon, and in support of said application sets forth the following:

1. John T. Clark & Son is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office or place of business at 17 State Street, New York, New York.

2. On or about June 16, 1941 John T. Clark & Son pursuant to New York City Local Law 103 of 1939 filed with the Collector of the City of New York a return of excise tax on gross receipts (Form 40B) for the calendar year 1939. Said return purported to show a tax due in the amount of $1,109.22, with interest thereon from June 15, 1940 to June 15, 1941 in the amount of $66.55, or a total tax and interest due of $1,175.77. Said return was filed under protest and duress and to avoid the imposition of penalties. The pro-

test was in writing dated June 14, 1941, was attached to said return and stated in detail the grounds of the protest. Payment of the tax was made at the time of filing the return. There is attached hereto the cancelled check of John T. Clark & Son dated June 16, 1941 payable to the order of the City Collector, City of New York, in the amount of $1,175.77, [fol. 109] used in making payment of such tax and interest.

3. On information and belief, said tax in the amount of $1,109.22 and said interest in the amount of $66.55 were erroneously, illegally or unconstitutionally collected and should be refunded for the following reasons:

(a) John T. Clark & Son is, and for many years prior to and including the year 1939 has been, engaged in the general stevedoring business. The business consists of the loading and/or unloading of ships and other vessels engaged exclusively in commerce between the United States and foreign countries and the entire gross receipts upon which said tax was exacted and paid were payments received for such loading and/or unloading. Such business of loading and/or unloading constitutes foreign commerce and the City of New York is without power to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts derived therefrom.

(b) Part of the gross receipts with respect to which the tax was paid were received for loading and/or unloading ships and other vessels in harbors other than harbors of New York State and said part of such gross receipts were therefore received for the performance of acts outside of the territorial limits and jurisdiction of New York State and New York City.

(c) Part of the gross receipts with respect to which the tax was paid were received for the performance of acts on [fol. 110] ships and other vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York.

(d) Said Local Law 103 of 1939 does not authorize the imposition on John T. Clark & Son of a tax for the privilege of carrying on its business nor does it require John T. Clark & Son to include in gross receipts used as the measure of said tax any or all of its receipts from said business.

(e) If Local Law 103 of 1939 does authorize the imposition of a tax on John T. Clark & Son for the privilege of

engaging in its business it is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, the Fourteenth Amendment to said Constitution, Article I, Section 6 of the Constitution of the State of New York, and the Enabling Act, New York Laws of 1934, Chapter 873, as amended.

(f) If the Enabling Act, New York Laws of 1934, Chapter 873, as amended, purports to grant authority to the City of New York to enact legislation authorizing the imposition of a tax upon John T. Clark & Son for the privilege of carrying on its business, said Act is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and of the Fourteenth Amendment to said Constitution, and of Article I, Section 6 of the Constitution of the State of New York.

No hearing has been heretofore had with respect to the matters set forth herein and application is hereby made for a hearing.

John T. Clark & Son, by Wm. H. Clark, Pres.

[fol. 111] STATE OF NEW YORK,
County of New York, ss:

WM. H. CLARK, being duly sworn, says:

That he is President of John T. Clark & Son, the applicant above named, a corporation organized and existing under the laws of the State of New York, and that he has read the foregoing refund claim and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be made upon information and belief, and that as to those matters he believes it to be true.

Wm. H. Clark, Pres.

Sworn to before me this 11th day of June, 1942.

Stanley Oliver, Notary Public, New York County. N. Y. Co. Clk's No. 24, Reg. No. 4-O-54. Kings Co. Clk's No. 41, Reg. No. 4051. Bronx Co. Clk's No. 5, Reg. No. 32-O-44. Queens Co. Clk's No. 444, Reg. No. 2243. Certificate filed in Richmond Co. Commission expires March 30, 1944. (Seal.)

[fol. 112] APPLICATION BY JOHN T. CLARK & SON TO THE COMPTROLLER OF THE CITY OF NEW YORK FOR REFUND OF EXCISE TAX ON GROSS RECEIPTS FOR THE CALENDAR YEAR 1940.

John T. Clark & Son hereby applies for refund of excise tax on gross receipts paid by it for the calendar year 1940 and in support of said application sets forth the following:

1. John T. Clark & Son is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office or place of business at 17 State Street, New York, New York.

2. On or about June 16, 1941 John T. Clark & Son pursuant to New York City Local Law 78 of 1940 filed with the Collector of the City of New York a return of excise tax on gross receipts (Form 41B) for the calendar year 1940. Said return purported to show a tax due in the amount of $1,434.48. Said return was filed under protest and duress and to avoid the imposition of penalties. The protest was in writing dated June 14, 1941, was attached to said return, and stated in detail the grounds of the protest. Payment of the tax was made at the time of filing the return. There is attached hereto the cancelled check of John T. Clark & Son dated June 16, 1941 payable to the order of the City Collector, City of New York, in the amount of $1,434.48, used in making payment of such tax.

3. On information and belief, said tax in the amount of $1,434.48 was erroneously, illegally or unconstitutionally collected and should be refunded for the following reasons:

[fol. 113] (a) John T. Clark & Son is, and for many years prior to and including the year 1940 has been, engaged in the general stevedoring business. The business consists of the loading and/or unloading of ships and other vessels engaged exclusively in commerce between the United States and foreign countries and the entire gross receipts upon which said tax was exacted and paid were payments received for such loading and/or unloading. Such business of loading and/or unloading constitutes foreign commerce and the City of New York is without power to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts derived therefrom.

(b) Part of the gross receipts with respect to which the tax was paid were received for loading and/or unloading ships and other vessels in harbors other than harbors of New York State and said part of such gross receipts were therefore received for the performance of acts outside of the territorial limits and jurisdiction of New York State and New York City.

(c) Part of the gross receipts with respect to which the tax was paid were received for the performance of acts on ships and other vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York.

(d) Said Local Law 78 of 1940 does not authorize the imposition on John T. Clark & Son of a tax for the privilege of carrying on its business nor does it require John T. Clark & Son to include in gross receipts used as the measure [fol. 114] of said tax any or all of its receipts from said business.

(e) If Local Law 78 of 1940 does authorize the imposition of a tax on John T. Clark & Son for the privilege of engaging in its business it is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, the Fourteenth Amendment to said Constitution, Article I, Section 6 of the Constitution of the State of New York, and the Enabling Act, New York Laws of 1934, Chapter 873, as amended.

(f) If the Enabling Act, New York Laws of 1934, Chapter 873, as amended, purports to grant authority to the City of New York to enact legislation authorizing the imposition of a tax upon John T. Clark & Son for the privilege of carrying on its business, said Act is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and of the Fourteenth Amendment to said Constitution, and of Article I, Section 6 of the Constitution of the State of New York.

No hearing has been heretofore had with respect to the matters set forth herein and application is hereby made for a hearing.

John T. Clark & Son, by Wm. H. Clark, Pres.

[fol. 115] STATE OF NEW YORK,
County of New York, ss:

WM. H. CLARK, being duly sworn, says:

That he is President of John T. Clark & Son, the applicant above named, a corporation organized and existing under the laws of the State of New York, and that he has read the foregoing refund claim and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be made upon information and belief, and that as to those matters he believes it to be true.

Wm. H. Clark, Pres.

Sworn to before me this 11th day of June, 1942. Stanley Oliver, Notary Public, New York County. N. Y. Co. Clk's No. 24, Reg. No. 4-O-54. Kings Co. Clk's No. 41, Reg. No. 4051. Bronx Co. Clk's No. 5, Reg. No. 32-O-44. Queens Co. Clk's No. 444, Reg. No. 2243. Certificate filed in Richmond Co. Commission expires March 30, 1944. (Seal.)

[fol. 116] TAXPAYER'S EXHIBIT 6 IN EVIDENCE

(Letterhead of)
Baldwin, Todd & Young

November 7, 1942.

Comptroller of The City of New York, Municipal Building, New York, New York.

John T. Clark & Son

Application for refund of excise tax on gross receipts for the calendar year 1941

DEAR SIR:

In behalf of our client, the above named corporation, we enclose herewith application for refund of excise tax on gross receipts for the calendar year 1941 in the sum of $1,346.59. There is attached to the application the cancelled check of the corporation used in paying the tax.

Will you please acknowledge receipt of this letter and of the enclosed application by signing and returning the copy of this letter which is enclosed for that purpose.

Very truly yours, Baldwin, Todd & Young.

BA:LW 3 enclosures: Application, Cancelled Check, Copy of this letter

---

[fol. 117] APPLICATION BY JOHN T. CLARK & SON TO THE COMPTROLLER OF THE CITY OF NEW YORK FOR REFUND OF EXCISE TAX ON GROSS RECEIPTS FOR THE CALENDAR YEAR 1941.

John T. Clark & Son hereby applies for refund of excise tax on gross receipts paid by it for the calendar year 1941 and in support of said application sets forth the following:

1. John T. Clark & Son is a corporation duly organized and existing under and by virtue of the laws of the State of New York, with an office or place of business at 17 State Street, New York, New York.

2. On or about June 12, 1942 John T. Clark & Son pursuant to New York City Local Law 47 of 1941 filed with the Collector of the City of New York a return of excise tax on gross receipts (Form 42-B) for the calendar year 1941. Said return purported to show a tax due in the amount of $1,346.59. Said return was filed under protest and duress and to avoid the imposition of penalties. The protest was in writing dated June 12, 1942, was attached to said return, and stated in detail the grounds of the protest. Payment of the tax was made at the time of filing the return. There is attached hereto the cancelled check of John T. Clark & Son dated June 12, 1942, payable to the order of the City Collector in the amount of $1,346.59, used in making payment of such tax.

3. On information and belief, said tax in the amount of $1,346.59 was erroneously, illegally or unconstitutionally collected and should be refunded for the following reasons:

[fol. 118] (a) John T. Clark & Son is, and for many years prior to and including the year 1941 has been, engaged in the general stevedoring business. The business consists of the loading and/or unloading of ships and other vessels

engaged exclusively in commerce between the United States and foreign countries and the entire gross receipts upon which said tax was exacted and paid were payments received for such loading and/or unloading. Such business of loading and/or unloading constitutes foreign commerce and the City of New York is without power to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts derived therefrom.

(b) Part of the gross receipts with respect to which the tax was paid were received for loading and/or unloading ships and other vessels in harbors other than harbors of New York State and said part of such gross receipts were therefore received for the performance of acts outside of the territorial limits and jurisdiction of New York State and New York City.

(c) Part of the gross receipts with respect to which the tax was paid were received for the performance of acts on ships and other vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York.

(d) Said Local Law 47 of 1941 does not authorize the imposition on John T. Clark & Son of a tax for the privilege of carrying on its business nor does it require John T. Clark & Son to include in gross receipts used as the meas- [fol. 119] ure of said tax any or all of its receipts from said business.

(e) If Local Law 47 of 1941 does authorize the imposition of a tax on John T. Clark & Son for the privilege of engaging in its business it is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, the Fourteenth Amendment to said Constitution, Article I, Section 6 of the Constitution of the State of New York, and the Enabling Act, New York Laws of 1941, Chapter 199.

(f) If the Enabling Act, New York Laws of 1941, Chapter 199, purports to grant authority to the City of New York to enact legislation authorizing the imposition of a tax upon John T. Clark & Son for the privilege of carrying on its business, said Act is in violation of Article I, Section 8, Clause 3 of the Constitution of the United States, and of the Fourteenth Amendment to said Constitution, and of Article I, Section 6 of the Constitution of the State of New York.

No hearing has been heretofore had with respect to the matters set forth herein and application is hereby made for a hearing.

John T. Clark & Son, by Wm. H. Clark, Pres.

[fols. 120-121] STATE OF NEW YORK,
County of New York, ss:

W. H. Clark, being duly sworn, says:

That he is President of John T. Clark & Son, the applicant above named, a corporation organized and existing under the laws of the State of New York, and that he has read the foregoing refund claim and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be made upon information and belief, and that as to those matters he believes it to be true.

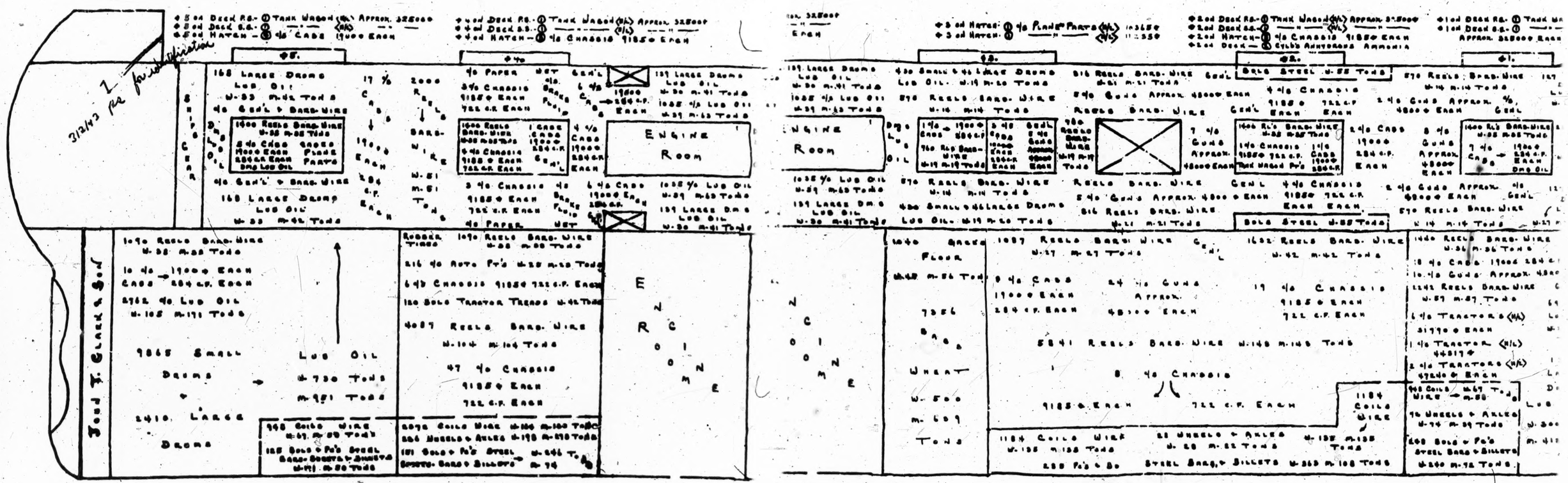
Wm. H. Clark.

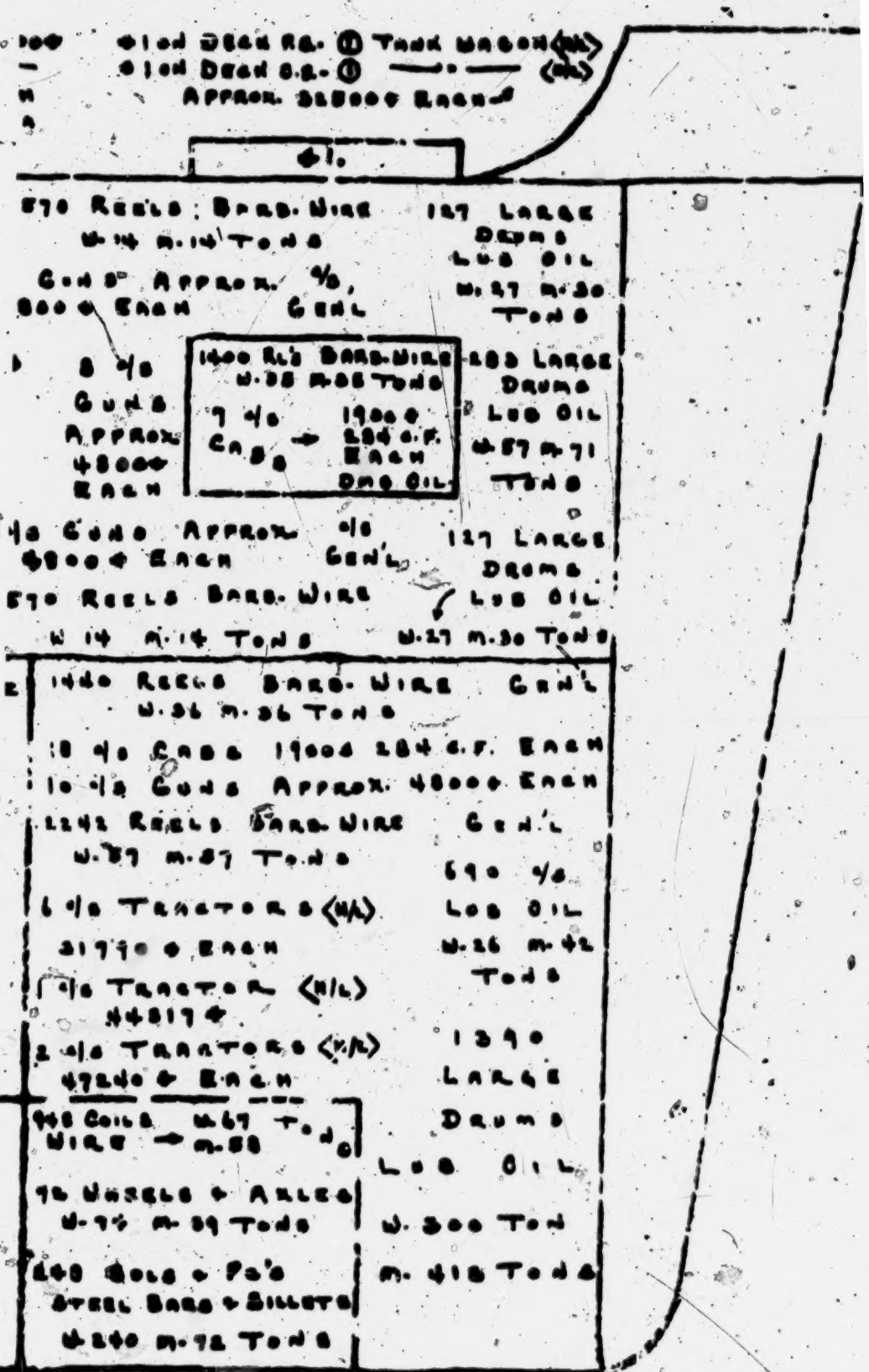
Sworn to before me this 5th day of November, 1942. Stanley Oliver, Notary Public, New York County. N. Y. Co. Clk's No. 24, Reg. No. 4-O-54. Kings Co. Clk's No. 24, Reg. No. 4051. Bronx Co. Clk's No. 5, Reg. No. 32-O-44. Queens Co. Clk's No. 444, Reg. No. 2243. Certificate filed in Richmond Co. Commission expires March 30, 1944. (Seal.)

(Here follows 1 photolithograph, side folio 122)

Taxpayer's E

Taxpayer's Exhibit 7 in Evidence


#5.
#4.
#3.
#2.
#1.
Engine Room
Engine Room
Boiler Room
Boiler Room
Engine Room
Engine Room
Engine


100 — M A
#1 on Deck Rd. (1) Tank Wagon (W.)
#1 on Deck S.B. (1) (W.)
Approx. 35000 Each
#1.
570 Reels Barb. Wire
W. 14 M. 14 Tons
Gen'l Approx. 1/3, 800 # Each
8 #/s Guns Approx 48000 Each
1400 Rls Barb-Wire W. 28 M. 28 Tons
7 #/s Cases → 19000 284 C.F. Each
Dmg Oil
127 Large Drums Lub Oil W. 27 M. 30 Tons
283 Large Drums Lub Oil W. 57 M. 71 Tons
#/s Guns Approx 48000 Each
1/3 Gen'l
570 Reels Barb. Wire
W. 14 M. 14 Tons
127 Large Drums Lub Oil W. 27 M. 30 Tons
1440 Reels Barb. Wire Gen'l W. 36 M. 36 Tons
18 #/s Cases 19000 284 C.F. Each
10 #/s Guns Approx 48000 Each
1242 Reels Barb. Wire Gen'l W. 31 M. 31 Tons
690 #/s
6 #/s Tractors (W.) 21990 Each
Lub Oil W. 26 M. 42 Tons
1 #/s Tractor (W.L.) 44814
2 #/s Tractors (W.L.) 47240 Each
1390 Large Drums Lub Oil
948 Coils Wire → W. 67 Tons M. 58
78 Wheels & Axles W. 99 M. 39 Tons
W. 300 Tons
268 Rods & Pc's Steel Bars & Billets W. 240 M. 92 Tons
M. 418 Tons

[fol. 123] TAXPAYER'S EXHIBIT 8 FOR IDENTIFICATION

Cunard White Star Ltd.

Memorandum of Agreement entered into this 29th day of January 1940 by and between John T. Clark and Son Contractor and Cunard White Star S/S Company, Ltd. Owners, Agents, or Charterers.

In consideration of the payment of the rates designated below, but subject to the terms herein mentioned, the Contractor agrees to stevedore the vessel(s) of the above named Owners, Agents, or Charterers, and perform such other services as may be stated at Pier 84 and 86, North River for

Passenger Ships:—

Discharging General Cargo (Passenger Ships) 2.25 pr. payable ton.

Discharging Baggage at cost plus insurance and S. S. Tax—plus 10%.

Discharging Mail at cost plus insurance and S. S. Tax—plus 10%.

Discharging Specie at cost plus insurance and S. S. Tax—plus 10%.

Discharging Passenger Autos at cost plus insurance and S. S. Tax—plus 10%.

Opening & Closing Hatches (Rigging) cost plus insurance and S. S. Tax.

Discharging Tramp Steamers at the Port of New York.

Discharging & Loading General Cargo (per payable ton) 1.798 per ton.

Extra Labor Men—Day 1.32 per hour plus 10%.

Extra Labor Hatch Fore. 1.50 per hour plus 10%.

[fol. 124] Extra Labor Head Fore. 1.96 per hour plus 10%.

Extra Labor Timekeeper 1.09 per hour plus 10%.

Extra Labor Overtime Men 1.98 per hour plus 10%.

Extra Labor Hatch Fore. 2.22 per hour plus 10%.

Extra Labor Head Fore. 2.93 per hour plus 10%.

Extra Labor Timekeeper 1.65 per hour plus 10%.

Overtime:—

Men	.66 per hour
Hatch Fore.	.72 per hour
Head Fore.	.96 per hour

Overtime:—

Timekeeper	.61 per hour
Gear Man	.66 per hour
Plan Clerk	.61 per hour

1. Equipment. The Contractor will provide stevedore gear for the stevedoring of the cargoes. The ship is to supply winches and sufficient steam or current for their efficient operation; dunnage; wire or rope for falls and slings; hatch tents; light for night work; tugs; coal hoisters; derricks or cranes for such heavy lifts as exceed the capacity of the ship's gear, and hoisters or cranes in lieu of ship's winches. In the case of grain cargoes the ship is to supply bags, separation cloths and dunnage boards whenever necessary; when requested, the Contractor will supply such material at current rates.

2. Increase or Decrease in Wages. All rates quoted are based on and subject to the prevailing wage scale and working conditions in the port of loading or discharging. In the event of an increase or decrease in such wage scale or change in working conditions, the rate will as a consequence be proportionately increased or decreased.

[fol. 125] 3. Strikes. In the event of strikes, lockouts, or other labor difficulties the Contractor will, if able to work, do so upon a basis of cost, plus 10% and insurance, in lieu of rates quoted, unless notified by the Owners, Agents or Charterers that no work is to be performed.

4. Insurance. The rates quoted are inclusive of insurance. The Contractor agrees to carry Workmen's Compensation Insurance for the protection of its employees and Public Liability Insurance for the protection of third parties injured by its employees.

5. Responsibility for Damage or Loss. The Contractor will be responsible for damage or loss to cargo through its negligence to the same extent as the Owners, Agents, or Charterers are responsible for such damage or loss to third parties. When damage or loss occurs to Cargo or Ship's equipment by reason of such negligence, the ship's officers or other authorized representative will call this to the attention of the Contractor and the responsibility fixed at that time insofar as it may be possible to do so.

6. Overtime, Meal Hours, Traveling Time and Transportation. Overtime and meal hours, when worked, will be charged for upon the basis of the rates provided in the prevailing wage scale of the port, plus insurance. When men are employed to work outside the Harbor limits and travel time is required to be paid the men, in accordance with the wage scale, such travel time will be charged for at cost, plus insurance. When vessels are worked in the stream or other places where means of transportation for the men are required, any expense incurred will be charged for at cost.

[fol. 126] 7. Detentions, Waiting or Lay Time. When men are employed and detention in excess of 15 minutes occur, or when men are employed and unable to work through causes beyond the contractor's control, or when men are to be paid for a minimum working period in accordance with the wage agreement, the cost for such time will be charged for at cost plus insurance.

8. Explosives or Dangerous Cargo. When such cargoes are loaded or discharged, a charge will be made by the Contractor based on the provisions of the wage scale applicable to these commodities, or in absence of a wage scale, charges will be made on the basis of the compensation which the Contractor may be compelled to pay for the performance of the work, plus 10% for overhead and gear, plus insurance, in lieu of the rates quoted, together with the cost of such equipment or apparel for the protection of the men, as may be required.

9. Damaged Cargo. When handling cargo damaged by fire, water, oil, etc., and where such damage causes distress or obnoxious conditions, or in all cases where the men are called upon to handle cargo under distress conditions, charges are to be based on the labor cost in accordance with the International Longshoremen's Agreement, plus 10% for overhead and gear, plus insurance, in lieu of the rates quoted, together with the cost of such equipment for the protection of the men as may be required.

10. Refrigerator or Cooled Space. Cargo handled to or from refrigerator or cooled space, in the absence of a special rate, will be charged for at the labor cost specified in [fol. 127] the wage agreement, plus 10% for overhead and gear, plus insurance. When commodities so handled are

quoted in the rate schedule the additional labor cost required by the wage agreement, plus insurance, will be added to the rates.

11. Rehandling or Shifting of Cargo. The rates quoted apply to one handling of cargo. When rehandling, resorting or shifting of cargo is necessary through no fault of the Contractor, the time required for such work will be charged for at cost, plus 10% for overhead and gear, plus insurance.

12. Handling to and/or From Other Than Cargo Spaces. When it is necessary to handle cargo by hand to or from compartments other than usual cargo spaces, such as peaks, storerooms, bridge lockers, alleyways, or glazarettes, the labor necessary to accomplish the work will be charged for at cost, plus 10%, plus insurance, in lieu of the rate quoted.

13. Commodities for Which No Rates Are Quoted. Commodities for which no quotations have been requested and not appearing in the rate schedule, will be charged for at cost plus 10% and insurance. Rates quoted subsequent to the acceptance of this contract will become a part thereof and subject to the general terms of the contract unless otherwise specified.

14. Notice of Arrival. Masters of vessels under this agreement shall be instructed by the owners to communicate with the contractor by radio or telegram advising the expected arrival at least 36 hours in advance.

[fol. 128] 15. Payment. Bills are payable upon presentation to the Owners, Agents, or Charterers.

16. Terminating Contract. The Owners, Agents, or Charterers shall have the right to terminate this contract at any time upon thirty (30) days notice—in writing to the Contractor.

17. Acceptance. The terms of this agreement are accepted, if such acceptance is noted hereon by the Owners, Agents, or Charterers, or their representatives, or in the absence of such notation, if the work contemplated under the terms of this agreement is performed by the Contractor.

Accepted:

Cunard White Star S/S Co., Ltd.

John T. Clark & Son.

TAXPAYER'S EXHIBIT 9 IN EVIDENCE

Memorandum of Agreement between Ellerman and Bucknall Steamship Company Limited (hereinafter referred to as "Bucknalls") of the first part and John T. Clark & Son Inc. (hereinafter referred to as "Clarks") of the second part.

This Agreement shall have effect from 1st July, 1939 and continue thereafter subject to three months notice in writing by either side, except if at any time during the currency of this contract Bucknalls shall have cause for dissatisfaction with the work done, when they shall be at liberty to cancel the contract forthwith.

[fol. 129] Clarks shall take delivery of goods, whether by land or by water, at the point where the shipper is bound to deliver them, transport the cargo to and load on board the oncarrying ship with all due dispatch, in any part of the ship in which it is determined to carry cargo for the voyage, including building up wings when midships are required to be kept open, and safely and properly stow same according to the destination, laying dunnage and platforms and chocking off and tomming where ne ary, all to the satisfaction of the Board of Underwriters of New York and/or other Surveyors.

Clarks shall break out, discharge and place the cargo on the wharf or into craft as required, and the cargo discharged on the wharf shall be placed as far as possible according to marks, and all transhipment cargo shall be placed on the wharf according to destination, so that it can be promptly forwarded without confusion, and all valuable cargo such as shellac, rubber, mica, goatskins, etc. shall be kept quite apart from other goods on the wharf.

All the work to be done with every care and due dispatch to the satisfaction of Bucknalls or their representatives.

Clarks shall supply all necessary tackle and appliances. Ship to supply winches and sufficient steam for their efficient operation; hatch tents, light for night work, rope for falls and slings, tugs, coal hoisters, derricks or cranes for such heavy lifts as exceed the capacity of the ship's gear, and hoisters or cranes in lieu of ship's winches. In the case of Grain Cargoes the ship is to supply bags, separation [fol. 130] cloths and dunnage boards whenever necessary; when requested, Clarks will supply such material at current rates.

Clarks shall be responsible for and indemnify and save harmless Bucknalls and/or the Owners and/or the Charterers against damage or loss to ship and/or cargo due to the negligence of Clarks or their workmen, to the same extent as Bucknalls and/or the Owners and/or the Charterers are responsible for such damage or loss to third parties. When damage or loss occurs to ship and/or cargo by reason of such negligence the ship's officers or other authorized representative shall call this to Clarks attention and the responsibility fixed at that time insofar as it may be possible to do so.

Clarks agree to take every precaution to see that their men do not smoke in the holds, and also agree that any man found smoking will be dismissed.

Clarks shall not sublet any of the work except by written consent first obtained from Bucknalls.

Clarks agree to give the ships the best possible attention and dispatch and guarantee to provide sufficient men to carry out the work, but they are not to be held responsible for strikes, or delays from accidents beyond their control.

In the event of strikes, lockouts, or other labour difficulties, Clarks will, if able to work, do so upon a basis of cost plus 10% and insurance, in lieu of the rates quoted, unless notified by the Owners, Agents, or Charterers that no work is to be performed.

Overtime and Meal Hours, when worked, will be charged for upon the basis of the rates provided in the prevailing wage scale of the port as set out hereafter. When men are [fol. 131] employed to work outside the harbour limits and travel time is required to be paid to the men in accordance with the wage scale, such travel time will be charged for at cost, plus insurance. When ships are worked in the stream or other places where means of transportation for the men are required, any expenses incurred will be charged for at cost.

When men are employed and detentions in excess of fifteen minutes occur, or when men are employed and are unable to work through causes beyond Clarks control, or when men are to be paid for a minimum working period in accordance with the wage agreement, the cost of such time will be charged at cost plus insurance.

When explosives or dangerous cargoes are loaded or discharged, a charge will be made by Clarks based on the provisions of the wage scale applicable to these commodi-

ties, or in the absence of a wage scale, charges will be made on the basis of the compensation which Clarks may be compelled to pay for the performance of the work plus 10% for overhead and gear, plus insurance, in lieu of the rates quoted, together with the cost of such equipment or apparel for the protection of the men, as may be required.

When handling cargo damaged by fire, water, oil, etc. and where such damage causes distress or obnoxious conditions, or in all cases when the men are called upon to handle cargo under distress conditions, charges are to be based on the labour cost in accordance with the International Longshoremen's Agreement plus 10% for overhead and gear plus insurance, in lieu of the rates quoted, together with the cost of such equipment for the protection of the men as may be required.

[fol. 132] Clarks shall be paid for handling cargo at the following inclusive rates:

LOADING.		
Case Oil—Yard or Dock (Kerosene, Benzine, Naptha, Turpentine, Gasolene and other like products)—High top or low top	$ .04	per case
General Cargo—up to 5 tons weight	1.16	per ton of 40 cu. ft. Or 2,240 lbs.
General Cargo—from 5 to 10 tons weight	1.40	" " "
General Cargo—over 10 tons weight	1.60	" " "
Locomotive and Car Material	1.50	" " "
Structural and Bridge Material	1.68	" " "
Grain, Flour, Meal, or Samp in bags	1.15	per ton weight
Sulphate of Ammonia in bags	1.15	" "
Cotton	.45	per bale
Tobacco (Hogsheads)	1.45	per ton
Rosin	1.50	per ton weight
Railroad Iron up to and including 45 feet	1.25	per ton
Railroad Iron over 45 feet and up to 60 feet	1.35	" "
Bar Iron	1.25	" "
Pipes of all sizes	1.50	" "
Steel Plates	1.50	" "
Apples	.095	" barrel
Apples	.044	" box
Unboxed Automobiles	.68	" ton of 40 cu. ft.
Newspapers in Bales	1.30	" manifest ton
Plus 3.8% due wages—1/1/40—		
DISCHARGING:		
Calcutta, Rangoon, Madras, Chittagong, and Coconada cargo, also Tea, Wool, Skins in bales or casks, Cotton, and Sisal	$ .68	per ton
Ceylon, Alleppey, Tellicherri, Malabar Coast, Aden, Port Sudan, Cochin, Calicut, Mangalore, Tuticorin, Port Said, Straits, Singapore, and Dutch East Indies cargo, also Onions, Wool, and Gambia	1.08	" "
Pig Iron, Ore in bulk	.80	per ton weight
Tin, Ore in bags	.90	per ton weight
Coffee per bag of 120 lbs.	.062	

[fol. 133]

Kapoc	1.90 per ton of 2,240 lbs.	
Kapoc	.95 per ton of 50 cu. ft.	
Paraffin Wax, Oil	1.25 per ton	
Rattâns	1.80 " "	
Bombay and Karachi General cargo	.55 per ton of 40 cu. ft.	
Bombay and Karachi General cargo	.90 per ton of 14 cwt.	
Coaling	$ 1.10 per ton	
Shifting Coal and Discharging	1.06 " "	
Overtime per gang per hour (loading)	$14.50	
Overtime per gang per hour (discharging)	16.50	
Head Foreman—per hour	.72	
Asst. Foreman " "	.72	
Plan Clerk	.66	1/4/40
Timekeeper	.66	1940
Extra Labour, Day rate (per man)	$ 1.26 per hour	1.32
Extra Labour, Day rate (per foreman)	1.44 " "	1.50
Extra Labour (overtime) per man	1.92 " "	1.98
Extra Labour (overtime) per foreman	2.16 " "	2.32

The rates include the cost of all trucking, winchmen, compensation insurance, old age benefit and Social Security Taxes whether Federal or State, tiering, rigging and unrigging, taking off and putting on hatches, mooring and unmooring, hoisting charges when vessel is loading at Oil Yard, shifting barges within reach of ship's tackle, and breaking down cargo on the Pier when loading. Tonnages as per ship's manifest unless otherwise quoted.

All rates quoted are based on and subject to the prevailing wage scale and working conditions in the port of loading or discharge. In the event of an increase or decrease in such wage scale, or change in working conditions, the rate will as a consequence be proportionately increased or decreased.

[fol. 134] The rates quoted are inclusive of insurance. Clarks agree to carry Workmen's Compensation Insurance for the protection of their employees and a full Public Liability Insurance for the protection of third parties.

The rates quoted apply to one handling of cargo. When rehandling, resorting, or shifting of cargo is necessary through no fault of Clarks, the time required for such work will be charged for at cost, plus 10% for overhead and gear, plus insurance.

When it is necessary to handle cargo by hand to or from compartments other than usual cargo spaces such as peaks, store-rooms, bridge, alleyways, lazarettes, the labour necessary to accomplish the work will be charged for at cost plus 10% plus insurance in lieu of the rate quoted.

Cargo handled to or from refrigerated spaces when cooled for the purpose of carrying cargo will be charged in the

absence of a special rate at the labour cost specified in the wage Agreement, plus insurance. When commodities so handled are quoted in the rate schedule the additional labour cost required by the wage Agreement, plus insurance, will be added to the rates.

Commodities for which no rates are quoted to be handled at General Cargo Rate until a rate can be mutually agreed.

Bills are payable promptly upon presentation to the Owners, Agents, or Charterers.

For John T. Clark & Son Inc., H. J. Beardell, Vice President.

For Ellerman & Bucknall Steamship Co. Ltd., C. Aubrey Lloyd, Managing Director.

[fol. 135] TAXPAYER'S EXHIBIT 10 IN EVIDENCE

This Agreement entered into this 15th day of November 1940, by and between MUNARGO LINE COMPANY, a Delaware corporation, hereinafter called the Steamship Company, and JOHN T. CLARK & SON, a New York corporation, hereinafter called the Contractor, witnesseth that

Whereas the Steamship Company is the owner of the Steamship "MUNARGO" and is operating her in her usual trade between New York and Miami, Nassau and Havana, and

Whereas the Contractor is engaged in the stevedoring business at the Port of New York, and Hoboken, N. J.

Whereas the Contractor desires to perform the stevedoring in connection with the loading and unloading of the Steamship "MUNARGO" at Pier 16, Hoboken, N. J., and the Steamship Company is willing to have the Contractor perform the stevedoring work in connection therewith upon the terms and conditions hereinafter set forth,

Now, Therefore, in consideration of one dollar and other good and valuable consideration receipt of which is hereby acknowledged and of the mutual promises hereinafter contained, it is hereby agreed by and between the parties hereto as follows:

1. The Contractor agrees promptly and carefully to receive and deliver, and to load and unload the cargo of the Steamship "MUNARGO" including mail and passengers' baggage, and to furnish sufficient, suitable and competent laborers and proper equipment therefor, and in connection

[fol. 136] therewith to provide the following services and equipment at its own expense and to assume and pay for the following costs:

(a) All necessary gear except winches, hoists, derricks, falls, topping lifts and guys constituting part of the ship's regular equipment, or other substituted or additional equipment which the Steamship Company may elect to supply.

(b) Handling lines of Steamship "MUNARGO" on arrival at and departure from dock between the hours of 8:00 A. M. and 5:00 P. M. and also handling lines of lighters and other craft between the same hours.

(c) Rigging and unrigging the Steamship "MUNARGO" as required by the loading or discharging to be performed and including removing and replacing all strongbacks and hatches.

(d) Shifting of lighters and similar craft by hand when such operation is practicable.

(e) Extra costs for loading or discharging refrigerated cargo from the ship's refrigerated space or for discharging wet hides, except as hereinafter provided.

(f) Expenses or compensation to laborers in the event the ship is loaded at the so-called "Ford Plant" at Edgewater, New Jersey.

(g) Breaking down cargo tiered on dock when loading ship and tiering cargo when discharging, except as hereinafter provided.

[fol. 137] (h) Coopering cargo including coopering materials except new packages when such are required.

(i) Expense caused by all detentions however caused except as hereinafter provided.

(j) Opening and closing pier doors as and when required by the Steamship Company.

2. The Steamship Company shall pay the following expenses in connection with the stevedoring work provided for herein but only when the expenses are incurred upon its order or with its knowledge and consent:

(a) Full overtime to laborers handling lines of Steamship "MUNARGO" or of lighters and other similar craft before 8:00 A. M. or after 5:00 P. M.

(b) The Steamship Company shall pay Eleven Dollars and Fifty Cents ($11.50) for each rigging or unrigging of hatch tents.

(c) Rigging and unrigging incidental to the handling of heavy or unusual cargo, by which terms is meant such heavy or bulky packages or pieces as cannot be safely handled by ship's ordinary rigging, the sum of Twenty-three Dollars ($23.00).

(d) Extra labor employed to tier cargo over ten feet (10') high.

(e) It is understood and agreed that the Contractor [fol. 138] shall cover the Steamship Company by insurance in a form to be approved by the Steamship Company against all risks of loss or damage to motor boats or similar craft while being loaded to or discharged from vessel in New York Harbor. The premium for said insurance shall first be paid by the Contractor and it shall be reimbursed for said premium or premiums by the Steamship Company.

(f) Rehandling cargo on board the vessel unless due to the error or fault of the Contractor or its servants and employees.

(g) Detentions of more than fifteen minutes each if caused by failure of equipment or appurtenances of the Steamship Company or by the non-arrival of cargo.

All work for the account of the Steamship Company under the provisions above stated shall be performed by the Contractor with all reasonable dispatch, and the Contractor shall charge the Steamship Company for such work at the actual cost of labor plus insurance excluding overhead.

3. The Steamship Company agrees to pay the Contractor for services performed hereunder at the following rates:

RECEIVING AND DELIVERING	
Contractor to receive, deliver, check, cooper and watch inbound and outbound cargo; receive passengers' baggage both inbound and outbound; clean dock, passengers' waiting room, and office. All of this service for	$. .55 per payable ton
(Munargo Line Company agrees to supply baggage master on sailing and arrival days.)	
[fol. 139]	
On inbound sugar discharged over ship's side to lighters, the rate will be	.22 per payable ton
Contractor to furnish extra labor when required in discharging trucks on Miami cargo only at:	
Straight time	1.10 per hour
Overtime	1.65 per hour
Plus Workmen's Compensation, Federal and State Unemployment Insurance.	

Where checkers are required to work overtime, the Steamship Company agrees to pay differential only at the rate of	.55 per hour
Plus Workmen's compensation, Federal and State Unemployment Insurance.	
Discharging Molasses	
Calibration of tanks and all necessary papers	15.00 per ship
Loading	
General Cargo	1.34 per payable ton
Passenger Automobiles as baggage	2.35 each
Discharging	
General Cargo	$ 1.34 per payable ton
Sugar—end of ship's tackle	.64 per payable ton
Sugar discharged on dock man high	.95 per payable ton
Passenger Automobiles as baggage	2.35 each
Loading and/or Discharging	
Passengers' Baggage	Cost Plus 10%
Mail	.07 per bag
Overtime per man	.66
Overtime per timekeeper	.66
Overtime per hatch foreman	.72
Overtime per head foreman	.72
Overtime per asst. head foreman	.72
Overtime discharging gang	15.90 per hour
Overtime loading gang	14.58 per hour
Labor Supplied	
Per man	1.32 per hour
Per foreman	1.50 per hour
Overtime Labor Supplied	
Per man	1.98 per hour
Per foreman	2.22 per hour

The above rates include insurance and taxes.

[fol. 140] The foregoing rates are understood to be based on the prevailing wage scale and working conditions at the Port of Hoboken, N. J., on the date of this agreement, and it is agreed that in the event of an increase or decrease in such wage scale or a material change in such working conditions during the period this agreement is in effect, such rates shall be increased or decreased accordingly.

4. The Steamship Company agrees to notify the Contractor a reasonable time in advance of each arrival of the Steamship "Munargo" at Pier 16, Hoboken, N. J., and to pay the Contractor's bills for services and expenses hereunder within a reasonable time after presentation.

5. The Contractor hereby assumes all responsibility and obligation for and agrees to indemnify and save harmless the Steamship Company, its vessels, agents, officers and crews from and against any and all claims, losses, damages,

costs and expenses of whatsoever kinds arising or resulting from or in connection with claims for death or personal injuries caused by or claimed to have been caused by or in connection with any of the work referred to herein, whether on board the Steamship "MUNARGO" or elsewhere, at or within the Port of Hoboken or other places adjacent thereto, where work is being performed under this agreement, and whether caused by the negligence of the Steamship Company, its agents or employees, or otherwise, including the following, but not excluding other causes: the use of winches, hoists, derricks, cranes, blocks, ropes, wires, falls, hatches, tackle, equipment or other gear or materials used or which should have been used on or in connection with the work referred to herein, or contemplated hereby, [fol. 141] whether belonging to the Steamship Company, or the Steamship "MUNARGO" or to the Contractor.

6. The Contractor undertakes and agrees to carry and to pay all premiums and charges for Workmen's Compensation Insurance as required by the laws of the United States, the State of New York, and the State of New Jersey, and shall file with the Steamship Company such certificates as may be required by any of the above laws, and shall exhibit to the Steamship Company at any time any and all insurance policies and premium receipts in connection with these and other provisions of this paragraph. The Contractor also agrees to carry and pay the premiums and charges for Public Liability Insurance to protect the Steamship Company, its vessels, agents, officers and crews, against claims or asserted claims of third parties injured during or in connection with the performance of work under or pursuant to this contract; and the Contractor shall carry and pay all charges and premiums for insurance protecting the Steamship Company, its vessels, agents, officers and crews against any and all possible actions or proceedings and the costs and expenses thereof brought by employees of the Contractor against the Steamship Company, its vessels, agents, officers or crews. The Steamship Company shall be included as co-insured in each insurance policy except the Workmen's Compensation policies issued to the Contractor pursuant to this paragraph, and all the policies referred to herein and contemplated hereby shall be submitted to and approved by the Steamship Company.

7. The Contractor shall indemnify and hold harmless the Steamship Company against all claims, demands, actions [fol. 142] and judgments which may be based upon or arise or grow out of delay in the loading or discharging of cargo or any loss including pilferage or damage to cargo resulting from the performance by the Contractor of its obligations hereunder or from defects in any gear or equipment furnished by the Contractor or by any improper acts or omissions of the Contractor or its employees.

8. It is understood and agreed that nothing herein shall obligate the Steamship Company to operate the Steamship "Munargo" out of the Port of Hoboken, and the Steamship Company may in its discretion, at any time and from time to time, for any reason whatsoever, lay up the said vessel, or sell or charter her to any person whatsoever (including corporations affiliated with the Steamship Company), or operate the vessel out of other ports or places, without any responsibility therefor to the Contractor.

9. This agreement shall become effective on the day of the date hereof, and shall continue in effect until terminated by either party by giving the other at least thirty days' notice in writing.

In Witness Whereof the Munargo Line Company and John T. Clark & Son have caused these presents to be executed by their corporate officers thereunto duly authorized the day and year first above written.

Munargo Line Company, by C. W. Munson, President.

Witness: Chas. O. Baldwin.

John T. Clark & Son, by H. J. Beardell, Vice President.

Witness: R. J. Davis.

[fol. 143] TAXPAYER'S EXHIBIT 11 IN EVIDENCE

General Cargo—Cargo Repairment

Checkers—Clerking

Port Watchmen

Agreements negotiated by the New York Shipping Association with the International Longshoremen's Association for the Port of New York and vicinity, effective January 1, 1940.

Issued by New York Shipping Association, 80 Broad Street, New York, N. Y.

Members are requested to direct inquiries regarding these Agreements to J. V. Lyon, Chairman, Conference Committee.

[fol. 144] Contents

	Page
I	
General Cargo Agreement	145
II	
Cargo Repairmen Agreement	156
III	
Checkers Agreement	158
IV	
Clerking Agreement	163
V	
Port Watchmen Agreement	169

A list of all signatories to each of the above Agreements is on file at the offices of the New York Shipping Association.

Printed April 1940

[fol. 145] I. General Cargo Agreement

Dated November 25, 1938; modified and extended December 29, 1939

This Agreement, made and entered into by and between the undersigned members of the New York Shipping Association, Deepwater Steamship Lines and Contracting Steve-

dores of the Port of Greater New York and vicinity, as party of the first part, and the International Longshoremen's Association and its affiliated Locals, as party of the second part, covers the loading and unloading of ships and the bunkering of same in the Port of Greater New York and vicinity.

1. Members of the party of the second part shall have all of the work pertaining to the rigging up of ships and the coaling of same, and th- discharging and loading of all cargoes including mail, ships' stores and baggage. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available.

2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours. Men shall work any night of the week, or on Sundays, Holidays, or Saturday afternoons, when required. On Saturday night, work shall be performed only to finish a ship for sailing on Sunday, or to handle mail or baggage.

(b) Meal hours shall be from 6 A. M. to 7 A. M., from 12 Noon to 1 P. M., from 6 P. M. to 7 P. M., and from 12 Midnight to 1 A. M.

[fol. 146] No work shall be performed during meal hours, except on arrival or sailing days or to complete discharging or loading a hatch within the meal hour or by mutual agreement between the parties hereto in the event of other emergencies.

(c) Legal Holidays shall be: New Year's Day, Lincoln's Birthday, Washington's Birthday, Good Friday on the New Jersey Shore: Decoration Day, Fourth of July, Labor Day, Columbus Day, Election Day, Armistice Day, Thanksgiving, Christmas, and such other National or State Holidays as may be proclaimed by Executive authority.

It is understood that so far as possible only baggage and mail shall be handled on Labor Day, Fourth of July and Christmas Day.

3. (a) Straight time rate shall be paid for any work performed from 8 A. M. to 12 Noon and from 1 P. M. to 5 P. M., Monday to Friday inclusive, and from 8 A. M. to 12 Noon Saturday.

(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

(c) The full meal hour rate shall be paid if any part of the meal hour is worked and shall continue to apply until men are relieved.

4. Wage Scale: The wage scale shall be as follows:

[fol. 147]

	Straight Time Hourly Rate	*Overtime Hourly Rate*
(a) General Cargo of every description, including barrel oil when part of General Cargo, and all General Cargo handled in refrigerator space with the temperature above freezing	$1.10	$1.65
(b) Bulk Cargo, ballast, and all coal cargoes, including loading and trimming coal for a ship's own bunker purposes	$1.15	$1.70
(c) Cement in bags	$1.15	$1.70
(d) Wet hides, creosoted poles, creosoted ties, creosoted shingles and soda ash in bags	$1.25	$1.80
(e) Refrigerator space cargo—meats, fowls and other similar cargo—which is to be transported with the temperature in the refrigerator at freezing or lower; these rates shall be paid the full gang	$1.30	$1.85
(f) Kerosene, gasoline and naphtha in cases and barrels, when loaded by case oil gangs, and with a fly	$1.30	$1.95
(g) Explosives	$2.20	$3.30
(i) When handled down the Bay, the time shall start from the time men leave the pier until the time they return to pier.		
(ii) When handled down the Bay, men shall supply their own meals, but $1.00 per meal shall be allowed by the employer.		
(iii) When explosives, such as are customarily handled down the Bay are handled at any pier, men shall be paid at the explosives rate of pay.		
(iv) Any dispute as to what explosives are, shall be settled by the Bureau of Explosives whose decision shall be final and shall be accepted by both sides.		
(h) Damaged Cargo	$2.20	$3.30
(i) All cargo damaged by either fire or water, when such damage causes unusual distress or obnoxious conditions, and, also, in all cases where men are called upon to handle cargo in the ship under distress conditions.		
(ii) The damaged cargo rates shall not be paid when sound cargo in a separate compartment is handled.		

5. When rubbers are required for handling wet cargo or explosives, or leather hand pads or gloves for barbed wire, they shall be provided by the employer.

[fol. 148] 6. Every effort shall be made to arrange for the payment of wages at a locality and at a time as convenient as possible to the men. Any abuse arising under this Clause shall be brought to the attention of the Arbitration Committee provided for in Clause 18.

7. The Foreman Stevedore shall hire the men. If he is not available, he may designate a substitute.

8. (a) Shaping time shall be at 7:55 A. M., 12:55 P. M. and 6:55 P. M. Men may be ordered out, however, for any other hour, Provided that those wanted between the hours of 8 A. M. and 12 o'clock, Noon, shall receive notice at the 7:55 A. M. shape, those wanted between the hours of 1 P. M. and 5 P. M. or at 5 P. M. or at 6 P. M., shall receive notice at the 12:55 P. M. shape, and those wanted at 7 P. M. or later shall receive notice at the 6:55 P. M. shape. When men are ordered out for work beginning Sunday morning, they shall be hired in regular gangs before 12 Noon on the Saturday preceding. Men wanted for work on a ship arriving on any of the Holidays referred to in Clause 2-(c), may be shaped only once on the Holiday at 7:55 A. M. at which time they shall receive definite orders whether or not they will be employed during the day or night.

(b) When men are employed at 8 A. M. or 1 P. M., or are ordered out for another hour, during the forenoon and/or afternoon on any week day from Monday to Friday inclusive, they shall receive a minimum of two hours' pay [fol. 149] for each period they are employed or report for work when so ordered out, regardless of weather conditions, unless the ship or the hatch in which the men are employed completes discharging or loading in less time.

(c) When men are employed on Saturday forenoon for any time between 8 A. M. and 12 Noon, they shall receive four hours' pay, except that when work is prevented by weather conditions they shall receive a minimum of two hours' pay.

(d) When men who have been employed on the premises on Saturday forenoon are re-employed on Saturday afternoon, they shall receive a minimum of two hours' pay for

the afternoon period from 1 P. M., regardless of weather conditions, unless the ship or the hatch in which the men are employed completes discharging or loading in less time. When men are re-employed on Saturday afternoon to resume work after 1 P. M., or when men who have not been employed on the premises on Saturday forenoon are employed on Saturday afternoon, they shall receive a minimum of four hours' pay from the hour they are ordered out and report for work, except that when work is prevented by weather conditions they shall receive a minimum of two hours' pay.

(e) When men are employed on Sundays or Holidays, they shall receive a minimum of four hours' pay for any time between 8:00 A. M. and 5:00 P. M., except that when work is prevented by weather conditions they shall receive a minimum of two hours' pay. However, when men who [fol. 150] have been employed in the forenoon have been knocked off because of weather conditions, they may be ordered back for work during the afternoon period, when they shall receive a minimum of two hours' pay for that period, regardless of weather conditions.

(f) When men who have been employed on the premises in the afternoon are re-employed at 7:00 P. M., they shall receive a minimum of two hours' pay, regardless of weather conditions, unless the ship or the hatch in which the men are employed completes discharging or loading in less time.

When men who have not been employed on the premises in the afternoon are employed at 5 P. M. or at 6 P. M., they shall receive a minimum of four hours' pay, such pay to commence at the hour ordered out, whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of two hours' pay.

When men who have not been employed on the premises in the afternoon are employed at 7 P. M., or later, they shall receive a minimum of four hours' pay, such pay to commence at 7 P. M., whether work begins then or later, except that when work is prevented by weather conditions they shall receive a minimum of two hours' pay.

(g) When men are ordered out and report for work at 7:00 A. M. but work is prevented by weather conditions at any time before 8:00 A. M., they shall be paid until 8:00 A. M.:

(i) On week days, including Saturday forenoon—one hour at the overtime rate and one hour at the straight time rate.

[fol. 151] (ii) On Sundays and Holidays—two hours at the overtime rate.

When men are ordered out and report for work at 7:00 A. M. and work is prevented by weather conditions at any time between 8:00 A. M. and 10:00 A. M., they shall be paid until 10:00 A. M.:

(i) On week days, including Saturday forenoon—one hour at the overtime rate and two hours at the straight time rate.

(ii) On Sundays and Holidays—three hours at the overtime rate.

(h) Only men needed to dock ships or handle mail may be ordered out at 6:00 A. M., and they shall be paid at the overtime rate until relieved, with a guarantee of four hours' work.

(i) The term "weather conditions," whenever referred to in this agreement, shall be understood to include such conditions as rain, snow or sleet, which conditions make it impracticable to work the ship; freezing weather when handling perishable cargo, which condition makes it impracticable to work the ship; fog, high wind, ice or abnormal tidal conditions which delay or prevent the berthing of the ship; also high winds or rough seas which delay or prevent the towing of lighters and other harbor craft to the ship.

9. When men are knocked off work five minutes after the hour or later they shall be paid for one-half hour, and when knocked off thirty-five minutes after the hour they shall be paid for one hour.

[fol. 152] 10. (a) Gangs shall be knocked off ten minutes before quitting time to replace hatch covers.

(b) The party of the second part undertakes to see that under no circumstances shall men leave a ship, or fail to return if ordered back, without replacing hatch covers, and further specifically agrees to discipline any man guilty of a violation of this rule.

11. No chemicals improperly packed or in any but first class shipping condition are to be accepted or loaded on board ship. If any question arises regarding the condition of this class of cargo, the matter shall be left to the proper authority whose decision shall be final.

12. The ship shall provide suitable shelter for men working on deck in bad weather.

13. (a) Minimum number of men in gang when loading or discharging general cargo shall be 20 men, not less than 8 holdmen discharging and 8 holdmen loading. This Clause shall apply to all general cargo Except:

(i) Cork, woodpulp, burlap, newsprint and logs where hooks are used;

(ii) Heavy lifts or sugar at sugar refineries or warehouses or lumber at lumber terminals,

(iii) Work at Ford's plant at Edgewater; if working offshore at Ford's plant, not less than four men shall be used on lighters.

[fol. 153] (iv) For discharging bale rubber—6 holdmen may be employed with a gang consisting of 26 men; for a gang consisting of from 20 to 25 men or of 27 or more men, 8 holdmen must be employed.

A Committe- representing both sides shall consider and rule upon any other disputed cases that may arise.

(b) Dockmen working inshore may be transferred to other gangs should their own gang go offshore. They must return to their original gang, however, when work is resumed inshore.

(c) When "two up-and-down falls with one Burton fall" are used for loading or discharging general cargo, a gang of 27 men including 10 holdmen shall be employed.

(d) The employer shall have the right to rig with the so-called "pick and strike" method or with the "falls together" or any other practical method, and in all cases where more than the minimum number of men are required, the employer shall be the judge of the number of extra men needed.

14. There shall be no beer or other intoxicating liquors brought upon the property of the party of the first part and, also, there shall be no smoking on the premises of the party of the first part. For a violation of this Clause the

guilty person may be discharged and given no further employment by the party of the first part.

[fol. 154] It is clearly agreed that no men are to be allowed to leave the pier during working hours for the purpose of obtaining drink, or for any purpose whatever, except with the express permission of the Foreman Stevedore in charge. The employers shall supply proper drinking water on pier, also adequate and clean toilet facilities and, further, shall make adequate arrangements to relieve deckmen when necessary.

15. The party of the second part will not try to uphold incompetency, shirking of work, pilfering or broaching of cargo; any man found guilty of the above offenses shall be dealt with as the party of the first part sees fit, or as the circumstances may require, if any man is convicted of theft he shall be expelled from the Union.

16. There shall be no discrimination by the party of the first part against any member of the party of the second part, nor shall the party of the second part discriminate against the party of the first part.

17. When men are specifically ordered out from New York or Brooklyn to work on the North and East Rivers above 75th Street, or on piers at Weehawken, Communipaw or West New York, carfare in excess of that spent in traveling to their usual place of employment shall be allowed.

Men specifically ordered out from New York or Brooklyn to work at Claremont, Edgewater or Astoria shall receive the equivalent of one hour's pay at the prevailing day rate, plus cost of transportation, and at Yonkers, Bayonne, Carteret, Chrome, Port Newark, Greenville or Bayway shall [fol. 155] receive the equivalent of two hours' pay at the prevailing day rate, plus cost of transportation.

Men specifically ordered out from Jersey City or Hoboken to work at Claremont, Edgewater, Bayonne, Port Newark, Greenville or Astoria shall receive the equivalent of one hour's pay at the prevailing day rate, plus cost of transportation, and at Yonkers, Carteret, Chrome or Bayway shall receive the equivalent of two hours' pay at the prevailing day rate, plus cost of transportation.

18. In the event of any dispute or controversy arising during the life of this agreement as to the interpretation of same, the men shall continue to work pending its adjust-

ment in the following manner: Upon written notice to the New York Shipping Association by either party, the matter in dispute shall be submitted to a Committee of four, two of whom shall be representatives of the party of the first part and two shall be representatives of the party of the second part; a decision of the majority of this Committee shall be final and binding. The Committee of four shall meet, whenever possible, on the Tuesday following the pay-day after the matter in dispute has arisen. In the event of failure on the part of this Committee of four to reach a satisfactory decision, they shall proceed to select a fifth member, who must be satisfactory to both sides, as Chairman, and the decision of the majority of the Committee so augmented shall be final and binding upon the parties. The fifth member shall be selected within seven days after the date of the failure of the Committee of four to reach a satisfactory decision.

[fol. 156] 19. Any man found guilty of violating any provision of this agreement shall be immediately expelled from his local organization.

20. No Steamship Company or Contracting Stevedore and no official, District Council, or Local of the International Longshoremen's Association, shall make any change in this agreement nor render any interpretation of any provision thereof which shall be binding on any of the parties hereto. A difference of opinion regarding the meaning of any provisions of this agreement, which cannot be amicably adjusted between the parties, shall be determined only by an Arbitration Committee appointed in accordance with Clause 18.

21. This agreement shall be effective from January 1, 1940 to September 30, 1941. Either of the parties may give written notice on or before September 1, 1940, requesting reconsideration of the *wage rates only;* in the event such a request is made, either party may then submit proposals and the parties shall meet to discuss the matter; any agreement reached on a revision of such wage rates shall become effective October 1, 1940 and shall remain in effect up to and including September 30, 1941.

II. Cargo Repairmen Agreement

Dated November 25, 1938; Modified and Extended December 29, 1939

This Agreement, made and entered into by and between the undersigned members of the New York Shipping Association, Deepwater Steamship Lines and Contracting [fol. 157] Stevedores of the Port of Greater New York and vicinity, as party of the first part, and the International Longshoremen's Association for Local 1171, Cargo Repairmen, party of the second part, covers the loading and unloading of deepwater vessels in the Port of Greater New York and vicinity.

1. Members of the party of the second part shall have all of the cargo repair work.

2. Except as hereinafter specified, Cargo Repairmen on deepwater vessels in the Port of Greater New York and vicinity, shall work under the same conditions and maintain the same differentials as the Longshoremen.

3. Cargo Repairmen shall be employed and paid on the half day basis at the prevailing rate whether work begins or not, Except that when work cannot begin owing to weather conditions, the weather conditions provisions of the Longshoremen's General Cargo Agreement shall apply, with the understanding, however, that if work is actually begun they shall be paid on the half-day basis even though work is subsequently knocked off because of weather conditions.

4. Cargo Repairmen in charge of piers as foremen for hiring, supervising or otherwise in charge of men shall be paid one dollar and twenty cents ($1.20) per hour, and for overtime at the rate of one dollar and ninety-five cents ($1.95) per hour.

5. Cargo Repairmen shall be paid off when laid off during daylight hours, but this shall not apply to Sundays or Holidays.

[fol. 158] 6. This agreement shall be effective from January 1, 1940 to September 30, 1941. Either of the parties may give written notice on or before September 1, 1940, requesting reconsideration of the *wage rates only;* in the event such a request is made, either party may then submit pro-

posals and the parties shall meet to discuss the matter; any agreement reached on a revision of such wage rates shall become effective October 1, 1940 and shall remain in effect up to and including September 30, 1941.

III. Checkers Agreement

Dated November 25, 1938; Modified and Extended December 29, 1939

This Agreement, made and entered into by and between the undersigned members of the New York Shipping Association, Deepwater Steamship Lines and Contracting Stevedores of the Port of Greater New York and vicinity, as party of the first part, and International Longshoremen's Association and its affiliated Locals, as party of the second part, covers the loading and unloading of deepwater vessels in the Port of Greater New York and vicinity.

1. Members of the party of the second part shall have all of the work pertaining to the tallying and checking of all deepwater cargo, including mail and baggage. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such other men as are available.

[fol. 159] 2. (a) The basic working day shall consist of 8 hours, and the basic working week shall consist of 44 hours.

(b) Meal hours shall be from 6 A. M. to 7 A. M., from 12 Noon to 1 P. M., from 6 P. M. to 7 P. M., and from 12 Midnight to 1 A. M.

No work shall be performed during meal hours, except on arrival or sailing days or to complete discharging or loading a hatch within the meal hour, or to receive or deliver cargo to or from trucks or steam lighters, or by mutual agreement between the parties hereto in the event of other emergencies.

(c) Legal Holidays shall be those specified in the Longshoremen's General Cargo Agreement.

3. (a) Straight day rate shall be paid for eight hours' work, or for any fraction thereof, performed from 8 A. M. to 12 Noon and 1 P. M. to 5 P. M., Monday to Friday, in-

clusive, and straight half-day rate from 8 A. M. to 12 Noon Saturday.

(b) All other time, including meal hours and the Legal Holidays specified herein, shall be considered overtime and shall be paid for at the overtime rate.

(c) The full meal hour rate shall be paid if any part of the meal hour is worked. A Checker who works during the meal hour on receiving or delivering cargo to or from trucks or steam lighters shall be relieved for his meal the hour immediately following; if relieved between 7 P. M. and 8 P. M., he shall be paid from 7 P. M.; when required to do so, however, he shall work through to 7 P. M., at which time he [fol. 160] shall either be relieved or be knocked off.

4. The wage scale shall be as follows:

	Straight Time Day Rate	*Straight Time Saturday Morning Rate*	*Overtime Hourly Rate*
(a) Checkers	$8.50	$4.25	$1.65
(b) Dock Bosses	$9.25	$4.62½	$1.65
(c) Explosives	$17.00	$8.50	$3.30
(i) When handled down the Bay, the time shall start from the time men leave the pier until the time they return to pier.			
(ii) When handled down the Bay, men shall supply their own meals, but $1.00 per meals shall be allowed by the employer.			
(d) All cargo damaged by either fire or water, when working under distress conditions	$17.00	$8.50	$3.30
(e) On cargo calling for double time under the Longshoremen's General Cargo Agreement, working off-shore or tallying from the dock into ship shall be paid for at double time rates under the conditions specified in such agreement.			

5. (a) Checkers shall be paid off when laid off during daylight hours, but this shall not apply to Sundays or Holidays.

(b) In all instances not covered by paragraph (a), every effort shall be made to arrange for the payment of wages at a locality and at a time as convenient as possible to the men. Any abuse arising under this paragraph shall be brought to the attention of the Arbitration Committee provided for in Clause 9.

6. (a) Checkers or tallymen shall be advised when discontinuing work for the day or night whether or not their services will likely be required for the following day.

(b) Men shall be notified before 5 P. M. of the day on which night work is to be performed; before 5 P. M. of the [fol. 161] day preceding Holiday work, and before 12 Noon on Saturday when Sunday work is to be performed.

7. (a) When men who have been employed during the day are ordered back, they shall receive a minimum of two hours' pay if laid off or finished sooner with the work at hand. When men ordered back, work until 11 P. M. or Midnight, and are again ordered back for 1 A. M., they shall receive a minimum of two hours' pay between 1 A. M. and 5 A. M.

(b) When men who have been employed on Saturday forenoon are ordered back to work on Saturday afternoon, and fail to work the full period through no fault of their own, they shall receive a minimum of two hours' pay. When men who have not been employed on Saturday forenoon are ordered out to work on Saturday afternoon, they shall receive a minimum of four hours' pay.

(c) When men are ordered out for work on Sundays or Holidays, between 8 A. M., and 12 Noon or between 1 P. M. and 5 P. M., and fail to work the full four hour period through no fault of their own, they shall receive a minimum of four hours' pay. When such men have been ordered out for work between 8 A. M. and 12 Noon, and are ordered back for work during the afternoon period, they shall receive a minimum of four hours' pay for work during the afternoon period.

(d) When fresh men are ordered out for work between 7 P. M. and 11 P. M., and fail to work the full four hour period through no fault of their own, they shall receive a [fol. 162] minimum of four hours' pay. When such men are ordered back for work between 1 A. M. and 5 A. M., they shall receive a minimum of four hours' pay for work during the second period.

8. *(The text of this Clause, relating to traveling time, is identical with that of Clause 17 (page 154) of the "General Cargo" Agreement.)*

9. *(The text of this Clause, relating to disputes or controversies, is identical with that of Clause 18 (page 155) of the "General Cargo" Agreement.)*

10. (*The text of this Clause, relating to interpretations, is identical with that of Clause 20 (page 156) of the "General Cargo" Agreement.*)

11. There shall be no beer or other intoxicating liquors brought upon the property of the party of the first part and, also, there shall be no smoking on the premises of the party of the first part. For a violation of this Clause the guilty person may be discharged and given no further employment by the party of the first part.

12. The party of the second part will not try to uphold incompetency, shirking of work, pilfering or broaching of cargo; any one guilty of the above offenses shall be dealt with as the party of the first part sees fit or as the circumstances require.

13. (*The text of this Clause, relating to discrimination, is identical with that of Clause 16 (page 154) of the "General Cargo" Agreement.*)

[fol. 163] 14. This agreement shall be effective from January 1, 1940 to September 30, 1941. Either of the parties may give written notice on or before September 1, 1940, requesting reconsideration of the *wage rates only*; in the event such a request is made, either party may then submit proposals and the parties shall meet to discuss the matter; any agreement reached on a revision of such wage rates shall become effective October 1, 1940 and shall remain in effect up to and including September 30, 1941.

IV. Clerking Agreement

Dated November 25, 1938; modified and extended December 29, 1939.

This Agreement, made and entered into by and between the undersigned members of New York Shipping Association, as party of the first part, and International Longshoremen's Association and its affiliated Locals, as party of the second part, covers cargo receiving and delivery clerks and timekeepers and their immediate assistants, employed by the party of the first part at piers in the Port of Greater New York and vicinity.

1. Members of the party of the second part shall have the preference of all work on the piers pertaining to the

receiving and delivery of all deep-water cargo. When the party of the second part cannot furnish a sufficient number of men to perform the work in a satisfactory manner, then the party of the first part may employ such men as are available.

[fol. 164] 2. The week shall consist of 44 hours, with an eight hour day, Monday to Friday, inclusive, from 8 A. M., to 5 P. M., with one hour for meals between 11 A. M. and 2 P. M., and Saturday from 8 A. M. to 12 Noon. Any other time in excess of that mentioned shall be considered as overtime and shall be paid for as such.

3. Head receiving and delivery clerks and head timekeepers shall receive $57.50 per week, inclusive of any holidays falling within the week.

Note: Effective January 1, 1940, head receiving and delivery clerks and head timekeepers *who are employed on a weekly basis* are to be paid for the full 44 hours referred to in the first sentence of Clause 2 and are to receive $58.81 per week. Such revised 44-hour weekly wage rate is to be considered as inclusive of, and as compliance with, both the regular and the overtime rates of pay requirements of the Federal Wage and Hour Act.

4. Assistant receiving and delivery clerks and assistant timekeepers shall receive $47.00 per week, inclusive of any holidays, falling within the week.

Note: All of the provisions of the "Note" under Clause 3 are applicable also to assistant receiving and delivery clerks and assistant timekeepers, except that such classifications of labor are to receive $48.07 per week.

5. Work on Saturday afternoons, Sundays, and at night by the clerks and timekeepers referred to in Clauses 3 and [fol. 165] 4 (above) shall be considered overtime and shall be paid for at the rate of $1.65 per hour.

If such clerks or timekeepers are called in to work on Sundays, they shall receive a minimum of four hours' pay (or $6.60) if ordered for work between the hours of 8 A. M. and 12 Noon, or between 1 P. M. and 5 P. M.; if called in between 8 A. M. and 12 Noon and ordered back to work between 1 P. M. and 5 P. M., they shall receive a minimum of four hours' pay for work done during the second period of the day.

6. Clerks and Checkers called in to work temporarily as assistants to receiving or delivery clerks or timekeepers shall be paid $1.25 per day in excess of the regular daily pay of Checkers, and for Saturday afternoon, Sundays, Holidays and at night overtime pay at the rate of $1.65 per hour. Holidays shall be those specified in the General Cargo Agreement.

If such temporary assistants are called in to work on Saturday afternoons they shall receive a minimum of two hours' pay (or $3.30).

If such temporary assistants are called in to work on Sundays or Holidays, they shall receive a minimum of four hours' pay (or $6.60), if ordered for work between the hours of 8 A. M. and 12 Noon, or between 1 P. M. and 5 P. M.; if called in between 8 A. M. and 12 Noon and ordered back for work between 1 P. M. and 5 P. M., they shall receive a minimum of four hours' pay for work done during the second period of the day.

If such temporary assistants are called in to work at night, they shall receive a minimum of four hours' pay (or [fol. 166] $6.60), if ordered for work between the hours of 7 P. M. and 11 P. M., or between 1 A. M. and 5 A. M.; if called in between 7 P. M. and 11 P. M. and ordered back for work between 1 A. M. and 5 A. M., they shall receive a minimum of four hours' pay during the second period of the night.

7. All members of the party of the second part who, on the effective date of this agreement (*), are employed on a weekly basis in the categories referred to in Clauses 3 and 4 (above) shall continue to be employed in their respective capacities and shall be protected to the extent of their rates of pay prevailing on the effective date of this agreement(*) if such rates are higher than the rates of pay provided for under this agreement and also of payment in full for vacations and sick leave if theretofore allowed by their respective employers; likewise, any such employees who, on the effective date of this agreement(*), are participating in pension plans, group insurance or other social security benefits, shall not be deprived of such advantages by this agreement.

(*) Note: October 1, 1938.

8. When temporary men are specifically ordered out from New York or Brooklyn to work on the North and East Rivers above 75th Street, or on piers at Weehawken, Communipaw or West New York, car-fare in excess of that spent in traveling to their usual place of employment shall be allowed. Temporary men specifically ordered out from New York or Brooklyn to work at Claremont, Edgewater or As-
[fol. 167] toria shall receive the equivalent of one hour's pay at the prevailing day rate, plus cost of transportation, and at Yonkers, Bayonne, Carteret, Chrome, Port Newark, Greenville or Bayway shall receive the equivalent of two hours' pay at the prevailing day rate, plus cost of transportation.

Temporary men specifically ordered out from Jersey City or Hoboken to work at Claremont, Edgewater, Bayonne, Port Newark, Greenville or Astoria shall receive the equivalent of one hour's pay at the prevailing day rate, plus cost of transportation, and at Yonkers, Carteret, Chrome or Bayway shall receive the equivalent of two hours' pay at the prevailing day rate, plus cost of transportation.

9. Each of the members of the party of the first part shall at all times be the sole judge of the number of clerical employees needed for the conduct of the work and shall assign their positions and duties in their own discretion, provided that this does not conflict with the spirit of Clause 7 (above).

10. (*The text of this Clause, relating to disputes or controversies, is identical with that of Clause 18 (page 155) of the "General Cargo" Agreement.*)

11. No Steamship Company and no official, District Council, or Local of the International Longshoremen's Association, shall make any change in this agreement nor render any interpretation of any provision thereof which shall be binding on any of the parties hereto. A difference of opin-
ion regarding the meaning of any provisions of this agree-
[fol. 168] ment, which cannot be amicably adjusted between the parties, shall be determined only by an Arbitration Committee appointed in accordance with Clause 10 (above).

12. There shall be no beer or other intoxicating liquors brought upon the property of the party of the first part. For a violation of this Clause the guilty party may be discharged and given no further employment by the party of the first part.

13. The party of the second part will not uphold incompetency, unauthorized stoppage of work, shirking of work, pilfering or broaching of cargo, or the unauthorized divulging to any person of payroll or other data pertaining to the business of a member of the party of the first part; the commission of any of the above offenses shall be sufficient cause for the dismissal of the guilty person and such action shall not be regarded as discrimination.

14. (*The text of this Clause, relating to discrimination, is identical with that of Clause 16 (page 154) of the "General Cargo" Agreement.*)

15. This agreement shall take effect as of January 1, 1940, and shall terminate on September 30, 1941. Either of the parties may give written notice on or before September 1, 1940, requesting reconsideration of the *wage rates only*; in the event such a request is made, either party may then submit proposals and the parties shall meet to discuss the matter; any agreement reached on a revision of such wage rates shall become effective October 1, 1940 and shall remain in effect up to and including September 30, 1941.

[fol. 169] V. Port Watchmen Agreement

Dated January 27, 1939; Modified and Extended January 29, 1940

This Agreement, made and entered into by and between the undersigned members of the New York Shipping Association and Contracting Watching Agencies, as party of the first part, and the International Longshoremen's Association and its affiliated Port Watchmen's Union Local 1456, as party of the second part, covers cargo watchmen employed by the party of the first part on piers in the Port of Greater New York and vicinity.

1. All cargo watchmen employed by the party of the first part, with the exception of crew watching on ships, where it has been the practice to use ships' personnel, Railroad Police and/or City Police, shall be members of the I. L. A. Local 1456, whenever such men are available. Whenever not available, the party of the first part shall have the right to employ any other men who can perform the work until such time as the party of the second part can furnish such men—but the party of the first part shall have the right

to employ such non-union men until the completion of the day on which they are employed.

2. The basic working day shall consist of three shifts of eight (8) hours each, from 8 A. M. to 4 P. M., 4 P. M. to 12 Midnight, and 12 Midnight to 8 A. M.—except that men may also be employed on an 8 A. M. to 5 P. M. shift and when working in this category through the noon meal hour shall be paid for that hour at the overtime rate. When [fol. 170] men are required for duty connected with the arrival or departure of ships, they may be ordered to report at any time within the 24 hours and shall receive a minimum of eight hours' pay from the time ordered to report, with the understanding that they may be assigned to perform any watchmen's work upon completion of such duty.

3. (a) The minimum wage scale shall be—

$5.25 for an 8 hour day for watchmen;
$5.75 for an 8 hour day for gatemen;
$6.25 for an 8 hour day for roundsmen;

subject to the exception specified in Clause 2 with respect to men on an 8 A. M. to 5 P. M. shift.

(b) If a man has worked more than eight consecutive hours in any twenty-four hours, he shall be paid for the excess number of hours worked at the overtime rate of one and one-half times the proportionate hourly rate, subject to the exception specified in Clause 2 with respect to men on an 8 A. M. to 5 P. M. shift; if brought back to work for a second shift of eight hours in any twenty-four hours, he shall be paid for such second shift at the overtime rate.

(c) If a man has worked for the same employer more than five days in any one week, he shall be paid for the first-half of the sixth day at the straight time proportionate hourly rate and for the second-half of that day at the overtime rate of one and one-half times the proportionate hourly rate, subject to the exception specified in Clause 2 with respect to men on an 8 A. M. to 5 P. M. shift.

[fol. 171] 4. If ordered out for work, the men shall receive a full day's pay except that when work is prevented by weather conditions they shall receive one-quarter of a day's pay.

5. Every effort will be made to arrange for the men to receive their wages in cash at a place and at a time as convenient as possible to the men weekly.

6. All uniforms and equipment, if required by the party of the first part, shall be paid for and furnished by the party of the first part, and shall remain the property of the party of the first part.

7. (*The text of this Clause, relating to traveling time, is identical with that of Clause 17 (page 154) of the "General Cargo" Agreement.*)

8. All assignments to work for the following day shall be given to watchmen, whenever practicable, before leaving their posts. Watchmen shall be allowed to shape at the piers and offices until 10 A. M.

9. It shall be the duty of watchmen to watch on piers all properties, cargo and movements of cargo to and from ships, lighters and trucks, and similarly in ship's holds where that has heretofore been the regular practice.

10. The party of the first part shall at all times be the sole judge of the number of men to be employed and the duties to which they are to be assigned and shall have the right to select the men they desire.

[fol. 172] 11. Any man who, prior to October 24, 1938, had been regularly employed on a six-day-week basis, shall (if still in the employ of the same employer) be continued on that basis, or be restored to that basis, as the case may be.

12. In the event of a strike of other pier employees who are members of other affiliated Locals of the International Longshoremen's Association, the party of the second part agrees that the watchmen, gatemen and roundsmen referred to herein will nevertheless continue at their posts and will protect the property and cargo of the party of the first part, unless strikebreakers are employed on work covered by other agreements between the party of the first part and the party of the second part.

13. (*The text of this Clause, relating to disputes or controversies, is identical with that of Clause 18 (page 155) of the "General Cargo" Agreement.*)

14. No Steamship Company or Contracting Watching Agency and no official, District Council, or Local of the International Longshoremen's Association, shall make any change in this agreement nor render any interpretation of any provision thereof which shall be binding on any of the parties hereto. A difference of opinion regarding the meaning of any provisions of this agreement, which cannot be amicably adjusted between the parties, shall be determined only by an Arbitration Committee appointed in accordance with Clause 13.

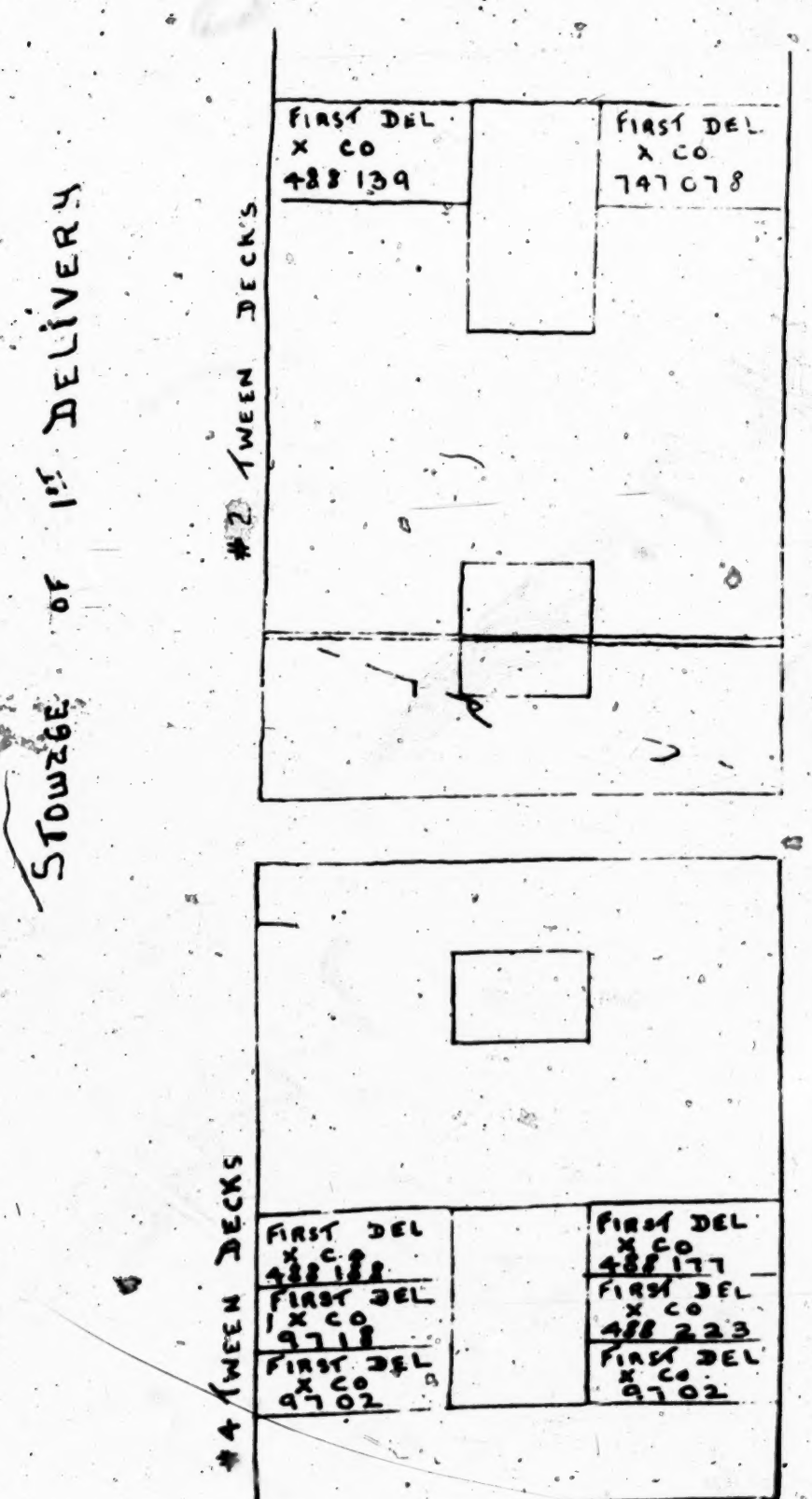
[fol. 173] 15. There shall be no beer or other intoxicating liquors, brought upon the property of the party of the first part. For a violation of this Clause the guilty person may be discharged and given no further employment by the party of the first part. It is clearly agreed that men shall not be allowed to leave the pier during working hours for the purpose of obtaining drink, or for any purpose whatsoever, except with the express permission of the supervisor in charge.

16. The party of the second part will not uphold incompetency, unauthorized stoppage of work, shirking of work, pilfering or broaching of cargo; the commission of any of the above offenses shall be sufficient cause for the dismissal of the guilty person and such action shall not be regarded as discrimination. If any man is convicted of theft, he shall be expelled as a member of the party of the second part.

17. (*The text of this Clause, relating to discrimination, is identical with that of Clause 16 (page 154) of the "General Cargo" Agreement.*)

18. This agreement shall take effect on January 1, 1940, and shall terminate on September 30, 1941. Either of the parties may give written notice on or before September 1, 1940, requesting reconsideration of the *wage rates only;* in the event such a request is made, either party may then submit proposals and the parties shall meet to discuss the matter; any agreement reached on a revision of such wage rates shall become effective October 1, 1940 and shall remain in effect up to and including September 30, 1941.

Taxpayer's Exhibit 12 in Evidence



- ON DECK -

- SYDNEY -
2 DRS 10 TNLS LACQUER
1 CYL CYCLOPROPANE
65 DBLS FORMALDEHYDE

- MELBOURNE -
110 DBLS FORMALDEHYDE
10 CYL LACQUER
1995 FRIED COTTON
45 DRS CHRONIC 1 CYL INK
44 CARBOYS FORMIC ACID

- L W -

ADELAIDE DRS OIL
MELBOURNE DRS OIL PAINTS
BRISBANE DRS OIL PAINTS

- SYDNEY -
500 DRS CYANIDE

- MELBOURNE -
500 DRS CYANIDE

DRS LUB OIL
- BRISBANE -

- ADELAIDE -
- ST LOUIS -
- MELBOURNE -
CARGO

AUTO
BRISBANE
PARIS

ADELAIDE
MELBOURNE
SYDNEY
BRISBANE

MAC'S CHEM BRISBANE AUS

F. DEL CO 9702
F. DEL CO 9713
F. DEL CO 48115

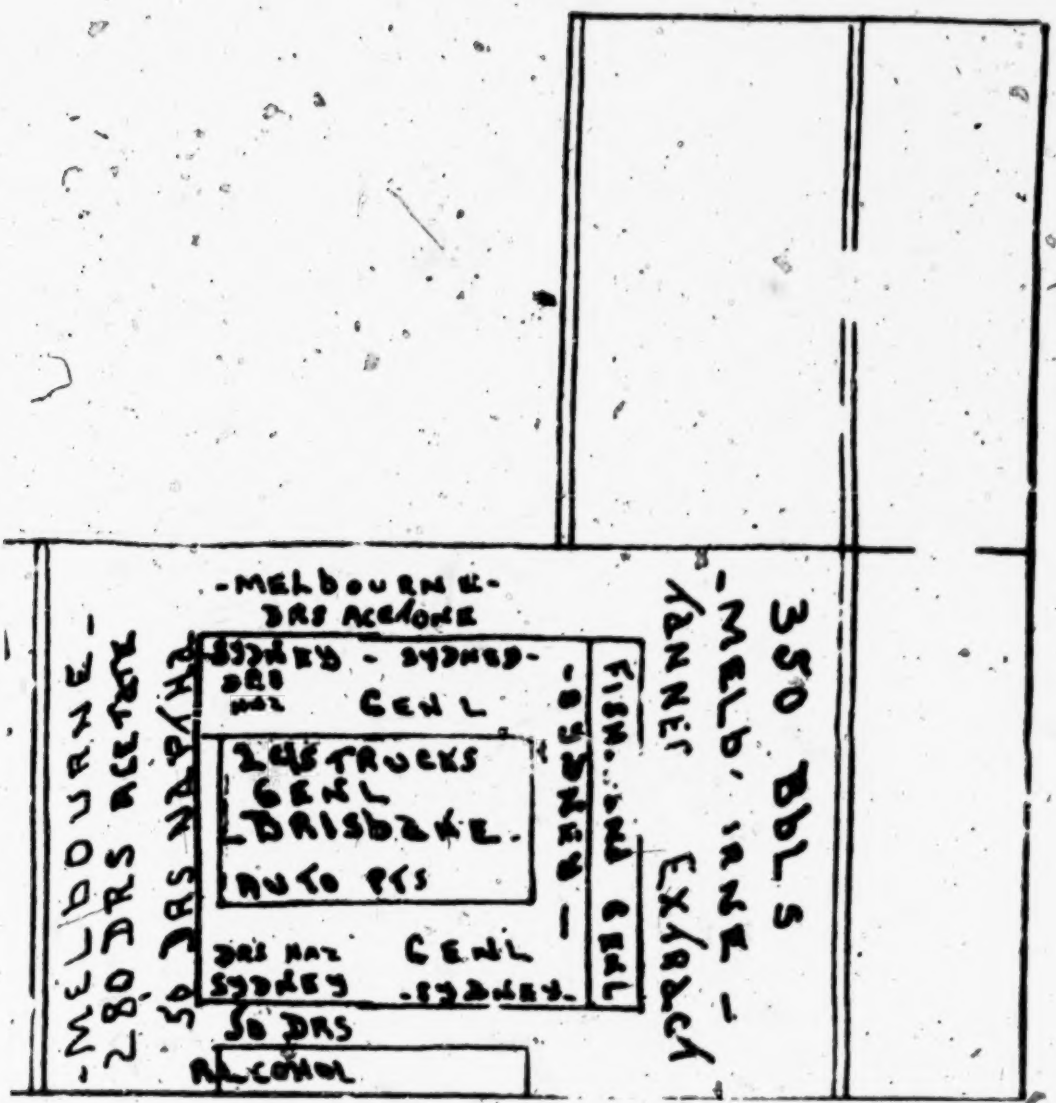
60 DBLS TAN EXTRACT
16 CYLS CHASSIS
ADELAIDE -
995 GLASS SHRUTOTS
1 CYL AUTO
90 TAN
CAN GLASGOW EXTRACT

DRS LUB OIL
- BRISBANE -
DRS LUB OIL

- MELBOURNE -
CHEM CORP
SYDNEY - DRS LUB OIL

COAL
ENGINE
ROOM.
COAL
COAL
COAL
COAL
COAL
ROOM
ROOM
615 FORDS
FISH-BEND AUTO PTS
SYDNEY - GENL CARGO
12615 TRUCKS 615 PTS
MELBOURNE PTS (ON)
AUTO PTS
FISH-BEND
615 FORDS
FUEL XCO 48124
GENL BRISBANE AUTOPTS
FUEL XCO 74702
BRISBANE - AUTO PTS GENL CARGO

ALBANE
SYDNEY
Fish Bend
MELBOURNE
ADELAIDE



[fol. 175] AFFIDAVIT OF NO OPINION

STATE OF NEW YORK,
County of New York, ss.:

Samuel M. Lane, being duly sworn, deposes and says:

That he is a member of the firm of Baldwin, Todd & Lefferts, attorneys for the petitioner herein, and is familiar with all the proceedings had herein and that no opinion was rendered by the court below in this proceeding.

Samuel M. Lane.

Sworn to before me this 10th day of August, 1944.
Charles E. G. Lloyd, Notary Public.

[fol. 176] STIPULATION WAIVING CERTIFICATION

It Is Hereby Stipulated that the papers as hereinbefore printed consist of true and correct copies of the order transferring this proceeding to the Appellate Division, First Judicial Department, the notice of application under Article 78 of the Civil Practice Act, petition, answer and return, and all other papers now on file in the office of the Clerk of the County of New York upon which the court below acted in transferring this proceeding to the Appellate Division for determination, except for the petitioner's undertaking for the payment of costs and petitioner's cancelled checks accompanying applications for refund, which are omitted herefrom and which may be handed up to the Court on the argument by either party hereto.

Certification thereof pursuant to Section 616 of the Civil Practice Act is hereby waived.

Dated, August 10, 1944.

Baldwin, Todd & Lefferts, Attorneys for Petitioner;
Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents.

[fol. 177] In Supreme Court of New York, New York County

In the Matter of the Application of John T. Clark & Son, Petitioner,

for an order against

Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Notice of Appeal to the Court of Appeals

Sirs:

Please Take Notice that the respondents hereby appeal to the Court of Appeals from the order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945 and entered in the office of the Clerk of said Appellate Division on or about the 28th day of March, 1945 annulling the determination of the respondent Joseph D. McGoldrick, Comptroller of the City of New York upon the law with $50 costs and disbursements and directing the respondents to refund the amount of the taxes paid by the petitioner herein and the respondents appeal from each and every part of said Appellate Division order [fol. 178] as well as from the whole thereof.

Dated, May 1st, 1945.

Yours, etc., Ignatius M. Wilkinson, Corporation Counsel, Attorney for Respondents, Office & P. O. Address, Municipal Building, Borough of Manhattan, New York City.

To: Baldwin, Todd & Lefferts, Esqs., Attorneys for Petitioner, 120 Broadway, Borough of Manhattan, New York.

Archibald R. Watson, Esq., Clerk of New York County.

[fol. 179] In Supreme Court of New York, Appellate Division, First Department

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Hon. Edward S. Dore, Justices.

15159 Order

In the Matter of the Application of John T. Clark & Son, Petitioner,

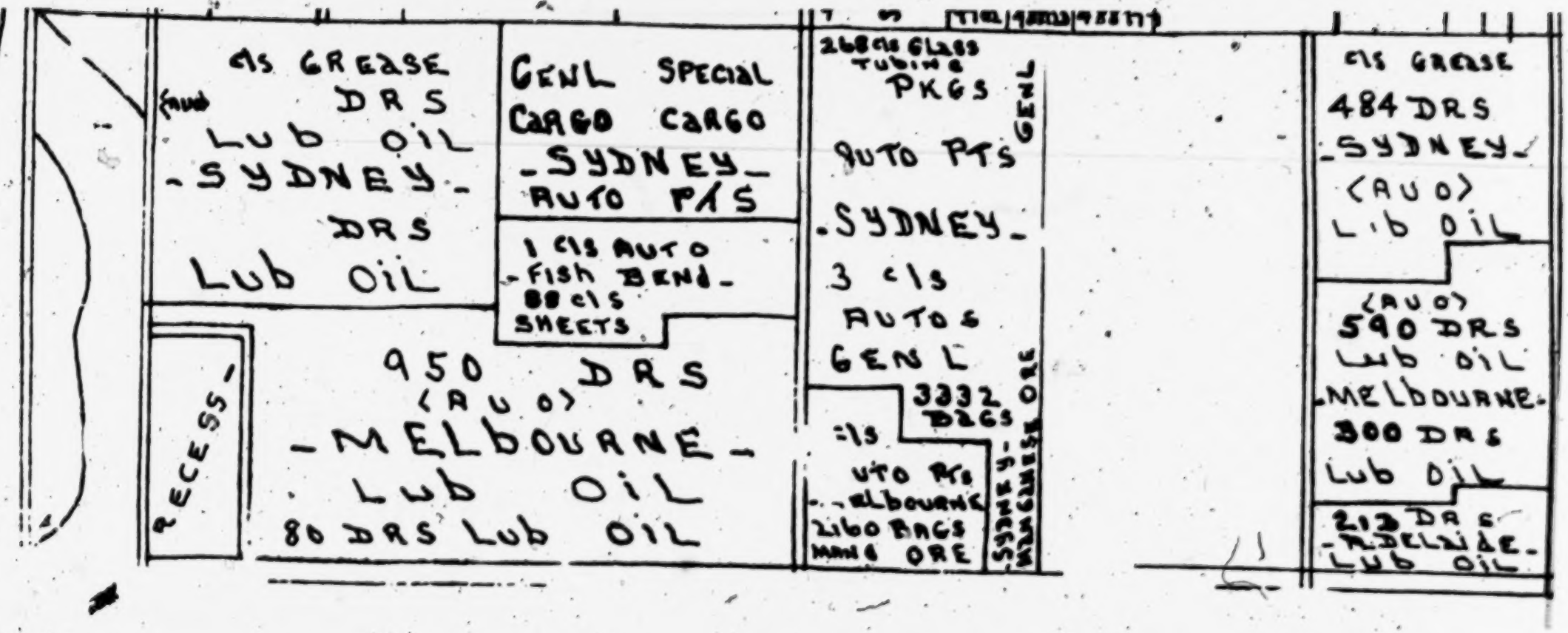
for an order against

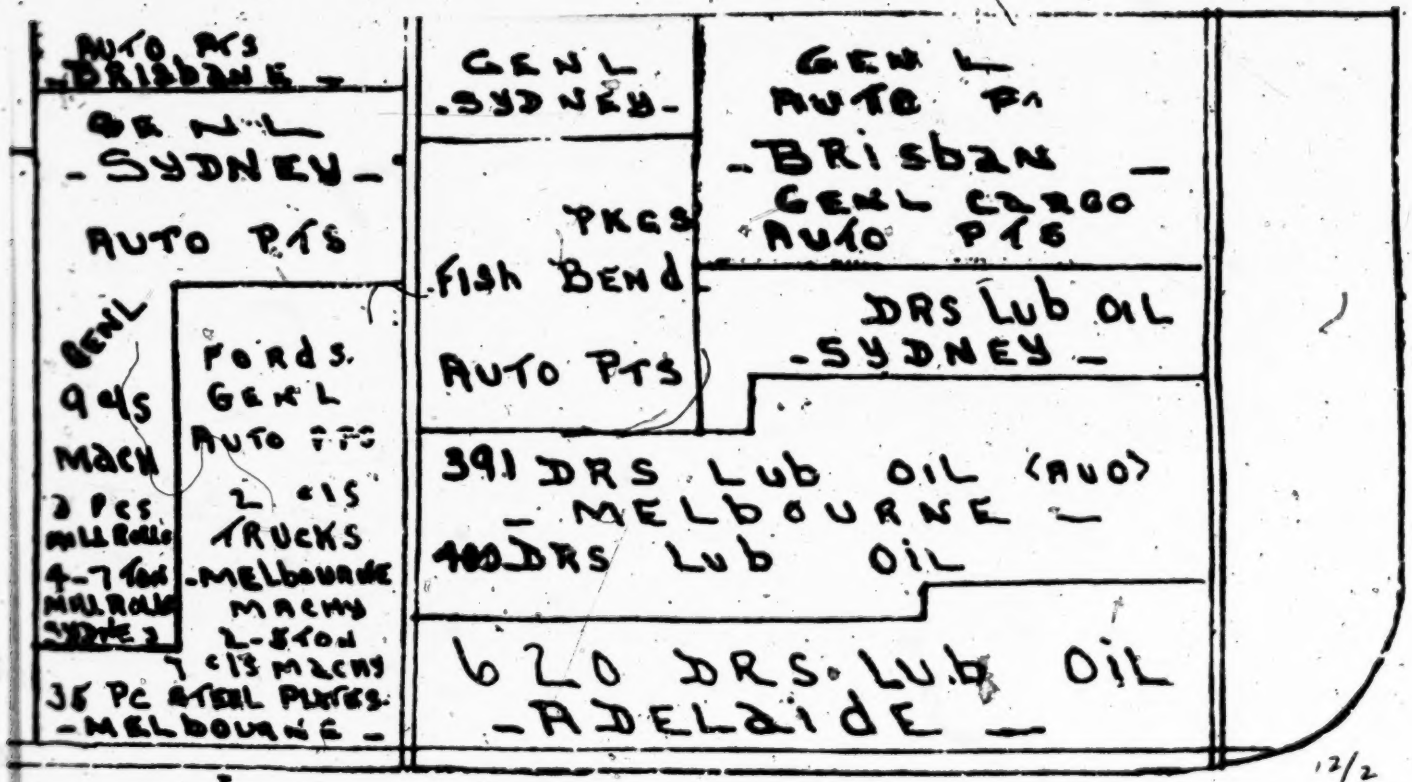
Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

Order—March 16, 1945

The above-named petitioner having moved at Special Term, Part I, of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Act, for an order transferring the record of this proceeding to this Court for a review of a final determination of respondent, Joseph D. McGoldrick, denying the application made by the peti- [fol. 180] tioner for refund of taxes in the total amount of $4,942.37, with interest thereon, assessed by the City of New York against petitioner for the years 1938, 1939, 1940 and 1941, pursuant to Local Law No. 20 of 1938, Local Law No. 103 of 1939, Local Law No. 78 of 1940, and Local Law No. 47 of 1941, which taxes were paid by petitioner to the City of New York under protest; and said motion having been granted by order dated May 3, 1944, transferring all proceedings and papers herein to this Court for review and determination; and the application to review said determination having been argued in this Court by Samuel M. Lane, Esq., of counsel for the petitioner, and by Samuel J. Warms, Esq., of counsel for the respondents; and due deliberation having been had thereon, it is unanimously

Ordered that the said determination of respondent, Joseph D. McGoldrick, be and the same hereby is in all respects annulled, upon the law, with $50 costs and disbursements to the petitioner; and it is further unanimously


CIS GREASE
DRS
Lub OIL
-SYDNEY-
DRS
Lub OIL
GENL SPECIAL
CARGO CARGO
-SYDNEY-
AUTO PTS
1 CIS AUTO
-FISH BEND-
88 CIS
SHEETS
950 DRS
(AUO)
-MELBOURNE-
Lub OIL
80 DRS Lub OIL
RECESS-
268 CIS GLASS
TUBING
PKGS
AUTO PTS
-SYDNEY-
3 CIS
AUTOS
GENL
3332
BAGS
CIS
UTO PTS
-ELBOURNE
2160 BAGS
MANG ORE
GENL
SYDNEY-
MANGANESE ORE
CIS GREASE
484 DRS
-SYDNEY-
(AUO)
Lub OIL
(AUO)
590 DRS
Lub OIL
-MELBOURNE-
300 DRS
Lub OIL
213 DRS
-ADELAIDE-
Lub OIL


AUTO PTS
-BRISBANE-
GENL
-SYDNEY-
AUTO PTS
GENL
945
MACH
2 PCS
MILLROLL
4-7 ton
MILLROLL
SYDNEY
FORDS
GENL
AUTO PTS
2 CTS
TRUCKS
-MELBOURNE
MACHS
2-5TON
7 CTS MACHS
35 PC STEEL PLATES
-MELBOURNE-
GENL
-SYDNEY-
PKGS
FISH BEND
AUTO PTS
GENL
AUTO PTS
-BRISBANE-
GENL CARGO
AUTO PTS
DRS LUB OIL
-SYDNEY-
391 DRS LUB OIL (AUS)
-MELBOURNE-
400 DRS LUB OIL
620 DRS. LUB OIL
-ADELAIDE-

12/2

174a

Ordered that the respondents, or either of them, upon due service of a certified copy of this order, forthwith refund to petitioner the amounts so paid, viz.: $3,595.78, paid on the 16th day of June, 1941, and $1,346.59, paid on the 12th day of June, 1942, with legal interest thereon to the date of such refund.

[fol. 181] In Supreme Court of New York, Appellate Division, First Department

Memorandum Opinion

(Reported in 113 New York Law Journal 1025, March 17th, 1945)

15159. Matter of John T. Clark & Son, pet. (McGoldrick, res.)—Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest, on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90). Settle order on notice.

Waiver of Certification

It is hereby stipulated that the foregoing are correct copies of the notice of appeal to the Court of Appeals, the order of the Appellate Division, the memorandum opinion of the Appellate Division and all the papers upon which said order and memorandum opinion of the Appellate Division are founded, all of which are now on file in the office of the Clerk of the County of New York; and certification thereof pursuant to Section 170 of the Civil Practice Act or otherwise is hereby waived.

Dated, New York, May 8th, 1945.

Ignatius M. Wilkinson, Corporation Counsel, Attorney for Defendant-Appellant. Baldwin, Todd & Lefferts, Attorneys for Petitioner-Respondent.

[fol. 182] IN COURT OF APPEALS OF NEW YORK

Witness, The Hon. John T. Loughran, Senior Associate Judge, Presiding. John Ludden, Clerk.

In the Matter of the Application of JOHN T. CLARK & SON, for an Order ag'st Joseph D. McGoldrick, Comptroller of the City of New York, & ano.

REMITTITUR—July 19, 1945

Be It Remembered, That on the 11th day of May in the year of our Lord one thousand nine hundred and forty-five, Joseph D. McGoldrick, Comptroller, &c., and another, the appellants in this cause, came here unto the Court of Appeals, by Ignatius M. Wilkinson, their attorney, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And John T. Clark & Son, the respondent in said cause, afterwards appeared in said Court of Appeals by Baldwin, Todd & Lefferts, its attorneys.

[fol. 183] Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Edmund B. Hennefeld, of counsel for the appellants, and by Mr. Samuel M. Lane, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed with costs. A question under the Constitution of the United States was presented and necessarily passed upon. The appellant contended that Local Laws No. 20 of 1938, No. 103 of 1939, No. 78 of 1940, and No. 47 of 1941, adopted by the City of New York pursuant to Chapter 873 of the Laws of 1934 of the State of New York, as amended, are not contrary to, or in violation of Article 1, Section 8, Clause 3 of the Constitution of the United States as applied to the taxing of receipts of the respondent from stevedoring operations. This court held to the contrary.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the

said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed with costs, &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court [fol. 184] of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(Signed) John Ludden, Clerk of the Court of Appeals of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,
Albany, July 19, 1945.

I Hereby Certify, that the proceeding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Signed) John Ludden, Clerk. (Seal of the Court of Appeals.)

[fol. 185] IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK, SPECIAL TERM, PART II

Present Hon. David W. Peck, Justice

In the Matter of The Application of JOHN T. CLARK & SON, Petitioner, for an Order against Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents

ORDER ON REMITTITUR—August 10, 1945

The above-named respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Almerindo Portfolio, as Treasurer of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of the Order of the Appellate Division of the Supreme Court, First Department, dated

the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 28th day of March, 1945, which Order annuls the determination of respondent, Joseph D. McGoldrick, with $50 costs and disbursements to the petitioner, and orders the respondents, or either of them, to refund to petitioner the sum of $3,595.78, paid by petitioner on the 16th day of June, 1941, [fol. 186] and the sum of $1,346.59, paid by petitioner on the 12th day of June, 1942, with legal interest thereon to the date of refund, and the said appeal having been duly argued in the Court of Appeals and the said Court of Appeals having ordered and adjudged, on the 19th day of July, 1945, that said Order of the Appellate Division of the Supreme Court, First Department, be affirmed with costs, and a certified copy of the Order of said Court of Appeals having been duly filed in the office of the Clerk of the County of New York,

Now, on motion of Baldwin, Todd & Lefferts, attorneys for the petitioner, it is

Ordered, Adjudged and Decreed that the said Order of the Court of Appeals be, and it hereby is, made the Order of this Court, and the Clerk is hereby directed to enter judgment accordingly.

Enter.

D. W. P., J. S. C.

[fol. 187] In Supreme Court of New York, County of New York

[Title omitted]

Affidavit of Regularity

State of New York,
County of New York, ss:

Samuel M. Lane, being duly sworn, deposes and says:

That deponent is a member of the firm of Baldwin, Todd & Lefferts, attorneys for the petitioner, and is familiar with the proceedings.

That the above named respondents appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court, First Depart-

ment, dated the 16th day of March, 1945, annulling the determination of respondent McGoldrick.

That the Court of Appeals affirmed the order of the Appellate Division of the Supreme Court, First Department. A certified copy of said order of affirmance is filed herewith.

That petitioner desires that the order of the Court of Appeals be made the order of this Court and that the Clerk be directed to enter judgment accordingly.

[fol. 188] That no other or previous application for the relief sought herein has been made to any Court or Judge.

Wherefore, deponent prays that said order of the Court of Appeals, affirming the order of the Appellate Division of the Supreme Court, First Department, be made the order of this Court, and that the Clerk be directed to enter judgment accordingly.

Samuel M. Lane.

Sworn to before me, this 9th day of August, 1945.
Norman Hall Deyo. Notary Public. (Seal.)

[fol. 189] In Supreme Court of New York, County of New York

In the Matter of the Application of John T. Clark & Son, Petitioner,

for an order against

Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Respondents.

Judgment on Remittitur—August 24, 1945

The above named respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Almerindo Portfolio, as Treasurer of the City of New York, having appealed to the Court of Appeals of the State of New York from each and every part of an Order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 28th day of March, 1945, and the Court of Appeals having, on the 19th day of July, 1945, ordered and adjudged that said

Order of said Appellate Division be affirmed with costs, and an Order having been duly entered thereon on the 11th day of August, 1945, making said Order of the Court of Appeals the order of this Court, and the remittitur of the Court of Appeals having been duly filed in the office of the Clerk of the County of New York, and said costs awarded by the Court of Appeals having been duly taxed by the Clerk of this Court on the 17th day of August, 1945, in the sum of $139.26, it is, on motion of Baldwin, Todd & Lefferts, attorneys for the petitioner,

[fol. 190] Adjudged that the Order of the Appellate Division of the Supreme Court, First Department, dated the 16th day of March, 1945, and entered in the office of the Clerk of said Appellate Division on or about the 28th day of March, 1945, be, and the same hereby is, in all respects affirmed, and it is further

Adjudged that the petitioner, John T. Clark & Son, whose address is 17 State Street, New York, New York, recover of the respondents, Joseph D. McGoldrick, as Comptroller of the City of New York, and Ahnerindo Portfolio, as Treasurer of the City of New York, each of whose address is Municipal Building of the City of New York, Borough of Manhattan, City of New York, State of New York, the sum of $139.26 costs as taxed, and that said petitioner have execution therefor.

Dated: New York, New York, August 24, 1945.

Archibald R. Watson, Clerk.

[fol. 191] In Supreme Court of New York, New York County

[Title omitted]

Affidavit of No Opinion

State of New York,
County of New York, ss:

John F. Kelly, being duly sworn, says:

That he is the Assistant Chief Clerk in the office of the Corporation Counsel of the City of New York, the attorney for the respondents-appellants in the above cause.

Deponent says that no opinion was written or handed down by the Court of Appeals in deciding the appeal in this cause.

John E. Kelly.

Sworn to before me this 28th day of September, 1945.
Harry Stockfeder, Notary Public, Kings County, N. Y. (Seal.)

[fol. 192] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 193] IN SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 19, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

[Endorsed on Cover:] File No. 50,222 New York, Supreme Court, Term No. 519: Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, Petitioners, vs. John T. Clark & Son. Petition for writ of certiorari and exhibit thereto. Filed October 17, 1945. Term No. 519 O. T. 1945.

Supreme Court of the United States

OCTOBER TERM, 1945

No. 512

Joseph D. McGoldrick, Comptroller of the City of New York, and Albertino Portolio, Treasurer of the City of New York,

Petitioners,

against

John T. Clark & Son,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF

October 17, 1945.

Ignatius M. Wilkinson,
Isaac C. Donner,
Counsel for Petitioners,
Municipal Building,
New York, N. Y.

Harry Katz,
Of Counsel.

INDEX

PAGE

Petition:

Petitioners 1

Jurisdiction and Timeliness 2

The Statutes, the Validity of Which Is Involved 3

Opinions Below 4

Summary Statement of the Matter Involved 5

Question Presented 6

Assignment of Errors 6

Reasons for Allowance of the Writ 7

Brief:

Statement of the Case 10

Jurisdictional Statement and Assignment of Errors 11

Argument

I. Under the principles enunciated in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and an unbroken line of later cases the tax imposed upon respondent's gross receipts from its activities carried on exclusively within the City of New York is clearly valid under the Commerce Clause 12

The holding in the *Puget Sound* case 13

Puget Sound holding is irreconcilable with later decisions 14

Puget Sound case is in effect overruled by the later cases relied on by petitioners 15

PAGE

II. The New York City general business tax, as applied to respondent's receipts is not barred by the Commerce Clause, since it is not an unconstitutional burden on interstate commerce 16

There is no discrimination 17

The tax is commensurate with the taxpayer's local activity 17

There is no possibility of an undue or multiple burden on interstate commerce 18

Conclusion 19

Appendix A. Provisions of local law 21

Appendix B. Provisions of State Enabling Act 38

Appendix C. Provisions of Article 2-B of General City Law 44

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938) 12, 15

Allied Mills, Inc. v. Dept. of Treasury, 318 U. S. 740 (1943), *aff'g* 220 Ind. 340, 42 N. E. 2nd 34 (1942) 12, 16

Carter & Weekes Stevedoring Co., Matter of, v. McGoldrick, 294 N. Y. 906 (1945) 2

Clark & Son, Matter of John T., v. McGoldrick, 269 App. Div. 685 (1945) 4

Clark & Son, Matter of John T., v. McGoldrick, 294 N. Y. 908 (1945) 4

Coverdale v. Pipeline Co., 303 U. S. 604 (1938) 12

Dept. of Banking v. Pink, 317 U. S. 264 (1942) 2

PAGE

Dept. of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252 (1941) 12

Dept. of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941) 12

Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939) 8, 12, 14, 15, 18

International Harvester Co. v. Dept. of Treasury, 322 U. S. 340 (1944) 12, 14, 16

McGoldrick v. Berwind-White Coal Mining Co., 308 U. S. 546 (1939) 2

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 12, 15

McGoldrick v. Compagnie Generale Transatlantique, 307 U. S. 620 (1939) 2

McGoldrick v. Gulf Oil Corp., 308 U. S. 545 (1939) 2

O'Kane v. State of New York, 283 N. Y. 439 (1940) 13*n*

Olive Coat Co., Matter of, v. McGoldrick, 287 N. Y. 769 (1942) 13*n*

Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937) 3, 6, 8, 12, 13, 15

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 6, 9, 12, 13*n*, 14, 15, 16, 18

Other Authorities Cited

LOCKHART, Gross Receipts Taxes on Interstate Transportation and Communication, 57 Harv. L. Rev. 40 (1943) 14

PAGE

Index to Statutes Cited

Administrative Code of the City of New York, Chap. 41—

Title O 3
Title R 3, 4, 11, 21-37
Title RR 3

General City Law of New York, Article 2-B 3, 4, 44-46

Laws of New York of 1934, Ch. 873 ..... 3, 4

Laws of New York of 1940, Ch. 245 ..... 4, 38-43

Laws of New York of 1941, Ch. 199 ..... 3, 44-46

Local Laws of the City of New York—
No. 20 of 1938 3
No. 103 of 1939 3
No. 78 of 1940 ..... 3, 4, 21-37
No. 47 of 1941 3

U. S. C. A., Title 28, §344, subd. (b) 2, 9

U. S. Constitution—
Commerce Clause (Art. 1, §8, cl. 3) 1, 2, 6, 8, 12, 13, 16, 19

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

To the Honorable the Supreme Court of the United States:

The petition of Joseph D. McGoldrick, Comptroller of the City of New York, and Almerindo Portfolio, Treasurer of the City of New York, respectfully shows:

1. Your petitioners are the Comptroller and Treasurer, respectively, of the City of New York, charged by law with the duty of administering and enforcing the tax laws here involved. The petition seeks review of a decision of the Court of Appeals of the State of New York holding that by virtue of the Commerce Clause of the United States Constitution (Art. 1, §8, cl. 3) the New York City general business tax may not be imposed upon respondent's gross receipts from its stevedoring activities carried on exclusively within the territorial limits of the City of New

York. The Court of Appeals stated in its decision that in deciding the matter this federal constitutional question was presented and necessarily passed upon by it (R. 183).

2. A companion case involving exactly the same question, *Matter of Carter & Weekes Stevedoring Company* v. *McGoldrick*, 294 N. Y. 906 (1945), was decided simultaneously with the present case. A petition for certiorari in that case is being presented together with the present petition.

Jurisdiction and Timeliness

3. The petition for certiorari is made under 28 U. S. C. A. §344, subd. (b), and the Court has jurisdiction to grant the writ. *McGoldrick* v. *Compagnie Generale Transatlantique*, 307 U. S. 620 (1939); *McGoldrick* v. *Berwind-White Coal Mining Co.*, 308 U. S. 546 (1939); *McGoldrick* v. *Gulf Oil Corp.*, 308 U. S. 545 (1939).

4. The decision of the Court of Appeals was handed down on July 19, 1945 (294 N. Y. 908). On or about August 11, 1945, the remittitur was filed in the office of the County Clerk of New York County, who is the Clerk of the Supreme Court of the State of New York, New York County, and accordingly the remittitur is in the custody of the Supreme Court. A final order of the Supreme Court, New York County, was entered upon the remittitur on August 14, 1945. This petition is being presented within three months of the date of the decision of the Court of Appeals and is therefore timely. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942).

5. The decision of the Court of Appeals was based solely on the ground that the tax as applied violated the Commerce Clause of the federal Constitution (R. 183). At the hearing before the petitioner-Comptroller upon the application of the taxpayer (respondent here) for refund of

general business tax paid, the taxpayer raised this ground of objection to the tax relying on the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937) (R. 24-26, 89, 93, 97, 101). Thereafter it was again raised in the proceeding brought by the respondent in the Appellate Division of the Supreme Court, First Department, to review the Comptroller's final determination denying its application for refund (R. 11). The Appellate Division sustained the objection and annulled the Comptroller's determination and directed that the taxes in question be refunded to the respondent on the authority of the *Puget Sound* case, *supra* (R. 181). Upon appeal by petitioners to the Court of Appeals, this federal question was the only one presented. The Court of Appeals affirmed, saying: "A question under the Constitution of the United States was presented and necessarily passed upon" (294 N. Y. 908).

The Statutes, the Validity of Which Is Involved

6. The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1938 to 1941, Local Laws No. 20 of 1938, No. 103 of 1939, No. 78 of 1940 and No. 47 of 1941 (constituting Titles O, R and RR of Chapter 41 of the Administrative Code of the City of New York). The first three of these local laws were enacted pursuant to Laws of New York of 1934, ch. 873, as annually amended, which conferred upon the City of New York authority to impose taxes such as the State itself might impose, including a general business tax on gross receipts. Since 1941 the authority of the City to impose this type of tax derived from Article 2-B of the General City Law of the State of New York, which was added to the General City Law by Laws of New York of 1941, ch. 199. So far as a general business tax on gross receipts is concerned, Article 2-B conferred upon the City of New York the same authority as was theretofore conferred by Laws of New York of 1934,

ch. 873. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to the State enabling acts authorizing them.

The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code) are printed as Appendix A. So far as the issues here involved are concerned, these provisions are substantially the same as the provisions of the other local laws involved. The provisions of the State enabling act, pursuant to which that local law was enacted (Laws of New York of 1940, ch. 245, amending Laws of New York of 1934, ch. 873), are printed as Appendix B. The provisions of this Act were somewhat different when the 1938 local law was enacted, the changes being necessitated by new provisions in the New York State Constitution, effective January 1, 1939, which changes did not, and do not in any way affect the questions raised and presented in this case. The enabling act for 1941 (Article 2-B of the General City Law) above referred to, prescribes a model general business tax law which the City is authorized to adopt. This model law was copied practically verbatim from New York City's general business tax law set out in Appendix A. The provisions of Article 2-B, except for the model law, are set forth as Appendix C.

Opinions Below

7. The memorandum opinion of the Appellate Division is reported in 269 App. Div. 685 (1945), and reads as follows:

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S. 90). Settle order on notice."

The memorandum affirmance of the Court of Appeals is reported in 294 N. Y. 908.

Summary Statement of the Matter Involved

8. The City general business tax is imposed without discrimination upon all persons engaged in or carrying on within the City any trade, business or profession. Under the first three local laws involved it was imposed at the rate of 1/10%, and under the 1941 law and thereafter at the rate of 1/20%, on gross receipts received in or by reason of any sale made or service rendered within the City.

The taxpayer is a corporation with its principal office in the City of New York, engaged in the general stevedoring business consisting of loading and unloading ships' cargoes and the contents of railroad freight cars moving in interstate and foreign commerce, and in performing other incidental services such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves. All taxpayer's activities are performed within the City of New York except a very small portion of its services (yielding a tax of $488.36 out of a total tax of $4,770.23), which are performed in New Jersey.

The petitioners did not in the Courts below and do not here press the issue of the taxability of the New Jersey services. The petitioners limit themselves here as they did in the Courts below solely to the question of the taxability of the respondent on the activities performed wholly within the territorial limits of the City of New York and upon its receipts from those activities. The receipts cover only the taxpayer's own activities and nothing more. Since none of the activities sought to be taxed is carried on outside the territorial limits of the City, the taxpayer could not be subjected to tax on these activities or these receipts by any other state. If the taxpayer is exempted from the City general business tax, it would be free of all tax on its receipts from these activities carried on exclusively within the City of New York.

Question Presented

9. The following question is presented in this case: Does the New York City general business tax imposed upon the respondent's receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York constitute an unconstitutional burden on interstate commerce?

Assignment of Errors

10. It is submitted that the Court of Appeals erred:

(a) In failing to hold that the City general business tax was validly imposed upon respondent's receipts here involved, under the recent decisions of this Court starting with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), cited in the brief annexed hereto at page 12, *infra*.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the more recent principles enunciated by this Court in the cases above referred to, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities here sought to be taxed constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination denying petitioner's application for refund of

City general business taxes paid by it on its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

Reasons for Allowance of the Writ

11. The reasons relied on by petitioners for allowance of the writ are as follows:

(a) In holding the City general business tax law as applied to respondent's receipts from its wholly intracity stevedoring activities to be an unconstitutional burden on interstate commerce, the Court of Appeals has decided a federal question of substance in a way not in accord with the applicable decisions of this Court cited in the accompanying brief, for the Court of Appeals has held invalid a tax upon gross receipts received from interstate commerce which (1) does not in any way discriminate against or otherwise burden interstate commerce; and (2) is measured by gross receipts derived solely and exclusively from activities which do not extend beyond the territorial limits of the City of New York.

(b) This case and its companion case are test cases upon the outcome of which depend many other cases involving substantially the same question. New York City is the foremost port, transportation and commercial center in the country. There are many and a great variety of substantial business concerns within the City engaged in promoting, servicing and transporting and delivering goods and passengers in interstate and foreign commerce, whose activities are, either wholly, or to a substantial degree, carried on within the territorial limits of this City. These include stevedores, passenger and freight agents, selling and marketing agents, *etc.* The receipts from these businesses run into substantial sums and the general business tax on those receipts is of considerable consequence.

(c) Respondent and other persons engaged in wholly local activities connected with or contributing to interstate and foreign commerce enjoy all the benefits, advantages and services afforded and provided by the City of New York that are enjoyed by other persons carrying on business within the City unconnected with such commerce. The tax involved being limited to wholly local activity, it cannot possibly be duplicated in any other jurisdiction. Hence, the effect of the decision of the Court of Appeals is to exempt persons engaged in wholly local businesses connected with interstate commerce, from contributing a just share toward the cost of maintaining and furnishing local governmental services which they enjoy, and to transfer the whole load to other local businesses. The Commerce Clause was not intended to confer such preferences, and it should not be interpreted to yield such a result.

(d) The decision of this Court in *Puget Sound Co. v. Tax Commission, supra,* has in effect been overruled by later cases involving the question of the effect of the Commerce Clause upon the taxing power of the States, cited in the attached brief, at page 12, *infra*, particularly *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939), which involved the liability of a taxpayer engaged, as was the Puget Sound Stevedoring Company, in rendering services connected with the shipment and sale of merchandise in interstate commerce (*i.e.*, not a person shipping his own merchandise), under the same Washington gross receipts tax as was involved in the *Puget Sound* case. The States and localities should know the extent to which they may apply the general principles and doctrines enunciated by this Court in the *Western Live Stock* and subsequent cases in that line, and whether the *Puget Sound* case represents a limitation upon those doctrines.

WHEREFORE, petitioners pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of New York in and for the County of New York commanding that Court to certify

and send to this Court on a day certain to be therein designated a full and complete transcript of the record and all proceedings of the said Court in this cause to the end that the case may be reviewed and determined in this Court as provided in 28 U. S. C. A. §344(b); and that the final order and judgment of the said Court and every part thereof may be reviewed and corrected by this Court in conformity with the Constitution and Laws of the United States and that the said final order and judgment may be reversed and the Comptroller's original determination denying the respondent's application for refund reinstated; and petitioners pray for such other and further relief as to this Court may seem just and proper, and the petitioners will ever pray.

Dated: New York, N. Y., October 17, 1945.

JOSEPH D. MCGOLDRICK,
Comptroller of the City of New York,

and

ALMERINDO PORTEOLIO,
Treasurer of the City of New York,
Petitioners.

by ISAAC C. DONNER,
Counsel for Petitioners,
Municipal Building,
Borough of Manhattan,
New York City.

Supreme Court of the United States

OCTOBER TERM, 1945

No.

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

The respondent is a New York corporation engaged in the business of general stevedoring, which consists of loading and unloading ships' cargoes and the contents of railroad freight cars, moving in interstate and foreign commerce (R. 27-28, 63-64), and the performance of other services, such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves (R. 79). Its sole office is in the City of New York (R. 67) and all its activities here involved * are performed solely and ex-

* As stated at page 5, *supra*, a very small portion of the taxpayer's stevedoring services are performed in New Jersey, but the tax on the receipts from those services is not in issue here. As to the New Jersey services, the City did not press the issue of their taxability in the Courts below, and does not do so now, but limits itself in this case solely to the taxability of respondent on its activities wholly within the City of New York.

clusively within the territorial limits of the City of New York (R. 71-73, 82). None of those activities, nor any part of them, is carried on outside the territorial limits of the City. All of the respondent's contracts for its services are made in New York City (R. 67). Its shops for the repair of its machinery are located in the City (R. 67). The taxpayer is paid by its customers, *i.e.*, the steamship companies, only for its stevedoring services and only these receipts from its own activities in the City are sought to be taxed (R. 32, 40, 41-43).

The New York City general business tax law imposes a tax upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, chapter 41 of the Administrative Code, §R41-2.0). Under the local laws of 1938, 1939 and 1940, it was imposed at the rate of 1/10%, and since 1941 at the rate of 1/20%, on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a further provision (§R41-2.0, par. b) to cover situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise. This provision authorizes the Comptroller to provide for allocation of such receipts so as to subject to tax only such part thereof as is properly attributable to the business done within the City. This provision does not directly affect respondent.

Jurisdictional Statement and Assignment of Errors

The Court will find these respectively at pages 2 and 6 of the petition, *supra*.

POINT I

Under the principles enunciated in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and an unbroken line of later cases the tax imposed upon respondent's gross receipts from its activities carried on exclusively within the City of New York is clearly valid under the Commerce Clause.

Respondent's objection to the tax (R. 24), and the decisions of the Courts below rested solely upon *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). That case, insofar as it held invalid under the Commerce Clause a State tax on gross receipts from wholly local activities connected with interstate commerce, is at variance and irreconcilable with the numerous later decisions of this Court on that question.

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938);
Coverdale v. *Pipeline Co.*, 303 U. S. 604 (1938);
Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938);
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939);
McGoldrick v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940);
Dept. of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62 (1941);
Dept. of Treasury v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941);
Allied Mills, Inc. v. *Dept. of Treasury*, 318 U. S. 740 (1943); aff'g *per curiam* 220 Ind. 340, 42 N. E. 2d 34 (1942);
International Harvester Co. v. *Dept. of Treasury*, 322 U. S. 340 (1944).

The principles enunciated in these cases should be applied to the case at bar. This requires a reversal of the Court below.

The holding in the *Puget Sound* case

The *Puget Sound* case involved a gross receipts tax on wholly local stevedoring activities, as does the case at bar. The fact that stevedoring is involved in both cases is probably why the *Puget Sound* case was considered controlling by the Courts below.* This fact, however, is purely incidental, merely establishing that interstate commerce was involved. The real question was the effect of the Commerce Clause on the right of States to impose a tax on gross receipts from interstate commerce. So far as this question is concerned, the essential facts of the *Puget Sound* case are: (1) the taxpayer was engaged in an activity found by the Court to be in interstate commerce; and (2) the taxpayer's activity was confined wholly to the territorial limits of the taxing State, and the gross receipts taxed were derived from this wholly local activity. The *Puget Sound* case held the tax barred by the Commerce Clause.

The sum and substance of the *Puget Sound* decision is that persons engaged in a wholly local business in or connected with interstate commerce may not be subjected by the States to a tax on gross receipts from that business. Thus, the Court said (302 U. S., at p. 94):

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. * * * The fact is not important that appellant does business as an independent contractor as long as the business that it does is commerce immune from regulation by the states. What is decisive is the nature of the act, not the person of the actor."

---

* This is indicated by the fact that although the Court of Appeals accepted and followed the doctrines of the *Western Live Stock* and later cases above cited, in *O'Kane* v. *State of New York*, 283 N. Y. 439 (1940), and *Matter of Olive Coat Co.* v. *McGoldrick*, 287 N. Y. 769 (1942), the latter case involving the same New York City general business tax law as is here involved, it did not do so in the case at bar.

***Puget Sound* holding is irreconcilable with later decisions**

This position has been completely discarded by this Court in its later decisions. (See cases cited p. 12, *supra*). The views of this Court as expressed in these later cases are stated as follows in *Gwin, White & Prince, Inc.* v. *Henneford, supra* (305 U. S., at pp. 438-439):

> "It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens, * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. See *Western Live Stock* v. *Bureau of Revenue, supra*, and cases cited. But it is enough for present purposes that under the commerce clause * * * State taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * * burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject."

The law as thus laid down represents the repeatedly expressed views of this Court in an unbroken line of decisions and opinions in later cases from *Western Live Stock* v. *Bureau of Revenue, supra*, in 1938, to *International Harvester Company* v. *Dept. of Treasury, supra*, in 1944. The holding of the *Puget Sound* case is utterly irreconcilable with the law as established by these later cases. In this connection reference is also made to comments on the *Puget Sound* case in LOCKHART, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40 (1943), 64-65, 82.

***Puget Sound* case is in effect overruled by the later cases relied on by petitioners**

The *Puget Sound* case, by contrast, has never been relied upon by this Court as authority for any of its subsequent decisions, and has in effect been overruled by the later cases. Its present ineffective status as precedent is markedly illustrated by the treatment accorded it by this Court in *Gwin, White & Prince, Inc.* v. *Henneford, supra,* which involved the very same Washington tax (Washington Laws 1935, c. 180) as had been before this Court in the *Puget Sound* case. Moreover, the taxpayer in the *Gwin, White & Prince* case, a company which marketed in other States and foreign countries fruit grown by Washington growers, was engaged, as was the Puget Sound Stevedoring Company, in a service "in aid of the shipment and sale of merchandise in that [interstate] commerce * * * [which] services are within the protection of the commerce clause * * *" (305 U. S. at p. 437).

The taxpayer in that case relied upon and cited the *Puget Sound* case. This Court in the *Gwin, White & Prince* case, in reaching the same result of invalidity as in the *Puget Sound* case, did not in its opinion even mention the *Puget Sound* case. That the *Puget Sound* case was rejected as authority by this Court is further indicated by the fact that Justices BUTLER and MCREYNOLDS, who concurred in the result of invalidity in the *Gwin, White & Prince* case, based their conclusion upon the doctrines of the *Puget Sound* case, and cited that case. However, as stated, the majority of this Court, without mentioning the *Puget Sound* case, cited and relied upon the doctrines of the cases upon which petitioners herein rely.

The only inference that can be drawn from these facts is that this Court rejected the *Puget Sound* case as controlling authority, and instead adopted and applied to the *Gwin, White & Prince* case, the principles and rationale it had enunciated and applied in the earlier *Western Live Stock* and *Adams Mfg Co.* cases, *supra.* It has repeatedly done so in other cases decided since that time. *McGoldrick*

v. *Berwind-White Coal Mining Co., supra; Dept of Treasury* v. *Ingram-Richardson Mfg. Co., supra; Allied Mills, Inc.* v. *Dept. of Treasury, supra; International Harvester Co.* v. *Dept. of Treasury, supra.* Under the circumstances the *Puget Sound* case has been in effect overruled.

The only other question remaining is whether the tax in the case at bar meets the test of validity under the Commerce Clause as laid down in the *Western Live Stock* and the other cases which petitioners cite and rely upon.

POINT II

The New York City general business tax as applied to respondent's receipts is not barred by the Commerce Clause, since it is not an unconstitutional burden on interstate commerce.

Under the recent cases cited at page 12, *supra*, wherein this Court set forth the applicable principles for determining the validity of State gross receipts taxes under the Commerce Clause, it is settled that: (1) persons doing business in, or connected with interstate or foreign commerce, are not immune from all taxes on their gross receipts; (2) such taxes are invalid under the Commerce Clause only if they discriminate against interstate commerce or result in the possibility of cumulative multiple tax burdens merely because interstate business is being done; (3) the possibility of cumulative multiple tax burdens is avoided as to such taxes by basing the tax either on the receipts from the particular activity locally carried on or, if the activity extends beyond State lines, upon a portion of the over-all gross receipts determined by formula to be commensurate with the activity locally carried on.

On the basis of these principles the tax at bar is clearly valid. It is not discriminatory; it is properly commen-

surate with activity carried on locally; and there is no possibility of cumulative multiple tax burdens.

There is no discrimination

The tax here involved is a general business tax. It applies without discrimination to all persons who are carrying on business within the City. The same rate of tax is imposed upon all persons and the same tax base—gross receipts—is used for all persons. The tax does not apply only to persons engaged in interstate and foreign commerce, nor does it apply to such persons at a higher rate or in any respect more onerously than to persons engaged in purely domestic business. The lack of discriminatory intent and the scrupulous regard for the right of persons engaged in interstate and foreign commerce is manifested by the special provision requiring that where taxation of a receipt in its entirety is barred by the Constitution, a proper apportionment shall be made. There can be no question, therefore, that there is no discrimination either as against persons engaged in foreign and interstate commerce generally or against this taxpayer in particular.

The tax is commensurate with the taxpayer's local activity

The receipts here in question arise out of the respondent's wholly local business activity. No part thereof is earned or contributed to by any activity outside the City. Hence, no allocation or apportionment is required to avoid the possibility of undue burden or multiple taxation, for it is clear that these receipts properly reflect the activity, and only the activity carried on within the City of New York. A tax, therefore, based upon these receipts is obviously commensurate with the respondent's local activity within the City of New York and cannot in any way be ascribed to, or regarded as being reflective of, any extra-city activity. The fact that this activity is in interstate commerce or that the receipts arise out of participation

in interstate commerce does not bar the tax. See cases cited page 12, *supra*. See also quotation from *Gwin, White & Prince, Inc.* v. *Henneford, supra,* at page 14, *supra*. "Even interstate business must pay its way," *Western Live Stock* v. *Bureau of Revenue, supra,* p. 254; *Gwin, White & Prince, Inc.* v. *Henneford, supra,* p. 438.

There is no possibility of an undue or multiple burden on interstate commerce

The tax here involved does not impose any affirmative impediment to the conduct of interstate business. The carrying on of such business is not conditioned upon the payment of the tax. No licensing requirement is imposed by the law. Failure to pay the tax does not bar a person from carrying on his business or from engaging in business activity within the City.

In the case at bar there is no possibility of a burden of cumulative multiple taxation. The respondent is engaged in business only in the City of New York. It has no place of business elsewhere. It has no property elsewhere. The services from which the receipts sought to be taxed arise are performed wholly within the territorial limits of the City. It is, therefore, impossible for the tax here involved to be a burden "of such a nature as to be capable, in point of substance, of being imposed * * * or added to * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it [taxpayer] would bear cumulative burdens not imposed on local commerce" (*Western Live Stock* v. *Bureau of Revenue, supra,* pp. 255-256).

Unless the tax at bar is sustained, this respondent and persons similarly situated who engage or participate locally in activities in interstate commerce will be absolved from payment of any tax on gross receipts. The effect of this, of course, will be to impose a heavier tax burden upon persons engaged in local business not regarded as in

interstate commerce, though the benefits, advantages and services afforded by the City are enjoyed equally by both groups of persons. While the Commerce Clause may be used to prevent the imposition of undue and multiple burdens upon persons engaged in interstate commerce, it is surely not intended to absolve such persons from paying a just share of the cost of local government and to impose a heavier burden upon persons not engaged in interstate commerce.

CONCLUSION

The Commerce Clause does not require that gross receipts from interstate commerce be exempt from local taxes. Such taxes are permissible if based upon gross receipts arising out of an activity carried on wholly within the taxing jurisdiction or, where the activity extends beyond State lines, upon such part of the receipts as is fairly commensurate with the activity locally carried on. Such a tax, either on gross receipts resulting from a wholly local activity, or from an allocable portion of the gross receipts if the activity extends beyond State lines, is not an undue burden on interstate commerce, since it cannot in point of substance be imposed by any other State.

The tax at bar is properly commensurate with a wholly local activity and is one which cannot be duplicated in any other jurisdiction. It is one that is imposed without discrimination of any kind. Therefore, this tax is not barred by the Commerce Clause.

Moreover, persons engaged in interstate commerce should be required to pay their way by contributing their share toward the cost of local government, whose benefits and services they enjoy. Local business men not in interstate commerce should not be forced to bear extra tax burdens for benefits and services which they enjoy on a parity with their fellow business men engaged in interstate commerce,

because the latter are absolved from the payment of their share of the cost of providing such benefits and services.

The petition for certiorari should be granted.

Dated: New York, N. Y.
October 17, 1945.

Respectfully submitted,

IGNATIUS M. WILKINSON,
ISAAC C. DONNER,
Counsel for Petitioners.

HARRY KATZ,
of Counsel.

APPENDIX A

Provisions of Local Law

LOCAL LAWS OF THE CITY OF NEW YORK

FOR THE YEAR 1940

No. 78

A LOCAL LAW to amend the administrative code of the city of New York, in relation to raising revenue for the purpose of relieving the people of the city of New York from the hardships and suffering caused by unemployment and the effects thereof on the public health and welfare, by re-enacting and imposing a tax upon the privilege of carrying on or exercising, for gain or profit, within the city of New York, any trade, business, profession, vocation, commercial activity or financial business, or of making sales to persons within such city, and extending the time during which such tax shall be imposed.

Became a law June 29, 1940, with the approval of the Mayor. Passed by the local legislative body of the city of New York.

Be it enacted by the Council as follows:

Section 1. Title R of chapter forty-one of the administrative code of the city of New York, as added by local law number one hundred three for the year nineteen hundred thirty-nine, is hereby amended to read as follows:

Appendix A

TITLE R

General Business and Financial Tax

§R41-1.0. **Definitions.** When used in this title the following terms shall mean or include:

1. "Person." Includes an individual, partnership, society, association, joint stock company, corporation, estate, receiver, trustee, assignee, referee or any other person acting in a fiduciary or representative capacity, whether appointed by a court or otherwise, and any combination of individuals carrying on or exercising for gain any trade, business, profession, vocation, or commercial activity within the city.

2. "Financial business." The services and transactions of private banks, private bankers, dealers and brokers in money, credits, commercial paper, bonds, notes, securities and stocks, monetary metals, factors, and commission merchants, and where the comptroller shall so determine as a fact, dealers in merchandise where the spread or difference between the cost of goods sold and the sale price is analogous to or in the nature of a commission and does not in any event exceed three percentum of the cost of goods sold, and such determination of fact by the comptroller shall be final.

3. "Receipts." The gross receipts received in, or by reason of any sale made or services rendered or commercial or business transaction had in the city, including cash, credits and property of any kind or nature, without any deductions therefrom on account of the cost of the property sold, the cost of materials used, labor or service or other cost, interest or discount paid, or any other expense whatsoever, but shall not include receipts from the sales, services or transactions hereinafter in schedule A specified.

Appendix A

For the purpose of determining receipts from the business of insurance, such receipts shall be taken to mean receipts from premiums received from risks in the city, whether by mutual or stock companies, domestic or foreign, without any deductions therefrom for any cost or expense whatsoever. The comptroller shall determine from such data as he shall require from insurance companies subject to the provisions of this title, the amount of such receipts and shall ascertain the amount of the tax in accordance with such determination. The business of insurance shall not be deemed to be a financial business.

SCHEDULE A

Receipts of the city and state of New York and of the government of the United States, only in so far as the receipts of the United States are immune from local taxation under the constitution of the United States.

Receipts of charitable and religious corporations or associations whose income is exempted from taxation under the laws of the state of New York.

Receipts of national banking associations, banks, trust companies and mutual savings banks subject to the provisions of articles three, five, six and seven of the banking law of the state of New York.

Receipts of co-operative corporations organized under the provisions of the co-operative corporations laws of the state of New York, or agricultural co-operatives organized under the authority of the federal government.

Receipts from sales of real estate and/or rents derived from real estate.

Receipts of public utility corporations, if otherwise taxed on gross income or receipts pursuant to the authority granted by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Appendix A

Receipts of a non-profit membership corporation for the purpose of holding a world's fair and confining its operations solely to preparing for and conducting such fair.

Wages and salaries of individuals.

4. "Gross income." The total amount of receipts of a person engaged in a financial business, excluding the cost of property sold, or moneys or credits received in repayment of advances, credits and loans, but not to exceed the principal amount thereof and excluding deposits.

5. "Exercising any profession, vocation, trade, business or commercial activity." Does not include labor or services rendered by an individual for a wage or salary.

6. "Comptroller." The comptroller of the city.

7. "Treasurer". The treasurer of the city.

§R41-2.0. **Imposition of tax.** a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, or as provided in subdivision e hereof; and for the privilege of carrying on any financial business, as defined in subdivision two of section R41-1.0 of this title, for gain or profit within the city for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise

tax which shall be equal to one-fifth of one percentum upon all gross income received in and/or allocable to the city received from such financial business carried on by him in the city during the calendar year in which such period shall commence, or as provided in subdivision c hereof. However, there shall be no tax imposed on those trades, businesses, professions, vocations or commercial activities where the gross receipts do not exceed ten thousand dollars per annum, and no return need be filed.

b. Where a receipt in its entirety cannot be subjected to the tax imposed by this title by reason of the provisions of the constitution of the United States or any other provision of law, the comptroller shall establish rules and regulations and/or methods of allocation and evaluation to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the city shall be taxed hereunder. The comptroller may make such allocation, with due regard to the nature of the business concerned, on the basis of mileage, division of the receipt according to the number of jurisdictions in which it may be taxed, the ratio of the value of the property or assets of the taxpayer owned and situated in the city to the total property or assets of the taxpayer wherever owned and situated and/or any other method or methods of allocation other than the foregoing calculated to effect a fair and proper allocation in accordance with the purposes of this provision.

c. If a person subject to the tax imposed by this title was not engaged in carrying on a profession, vocation, trade, business or commercial activity or financial business in the city during the whole of the calendar year referred to in subdivision a of this section, he shall pay the tax imposed by this title measured by his receipts or gross income, as the case may be, during the period of one year from the date when he became so engaged; and if such person shall not have been so engaged for an entire year prior to June

thirtieth of the year in which the tax imposed by this title becomes due and payable, then measured by his receipts or gross income for the period during which he was so engaged.

d. If any person liable for the tax after July first, nineteen hundred thirty-nine, acquired the assets or franchises of, or was merged or consolidated with another person, the person liable for the tax shall report as its receipts or gross income by which the tax is to be measured, the receipts or gross income of such other person together with its own receipts or gross income as provided in this section.

§R41-3.0. **Presumption and burden of proof.** For the purpose of the proper administration of this title and to prevent evasion of the tax hereby imposed, it shall be presumed that all receipts are a proper measure of the tax until the contrary is established, and the burden of proving that any payment or consideration received by any person subject to the tax hereby imposed was not received in or by reason of a sale made or service rendered or transaction had in the city shall be upon the person who received it.

§R41-4.0. **Filing of returns.** Every person subject to tax under this title shall on or before the fifteenth day of June of the years in which the one-year periods referred to in subdivision a of section R41-2.0 of this title shall end, file a return under oath with the treasurer, except that any person required to file a return for a period beyond the first day of May of any such year may file such return on or before the first day of August thereof. The comptroller, if he deems it necessary to insure the payment of the tax hereby imposed, may require returns of receipts from other persons. The forms of such returns shall be prescribed by the comptroller and shall contain such information as he may deem necessary for the proper administration of this title; and the comptroller or treasurer or their duly author-

ized agents or employees shall be empowered to require supplemental returns and to inspect the books and records of any person as defined in this title pertaining to his receipts. Whenever the treasurer shall require supplemental returns, he shall promptly notify the comptroller thereof.

§R41-5.0. **Payment of tax.** At the time of filing a return as required by this title each person shall pay to the treasurer the tax imposed by this title. Such tax shall be due and payable on the last day on which such return is required to be filed, without regard to whether a return is filed or whether the return which is filed correctly shows the amount of the tax due.

§R41-6.0. **Determination of tax.** If a return required by this title is not filed or if a return when filed is incorrect or insufficient, and the maker fails to file a corrected or sufficient return within twenty days after the same may be required by notice from the comptroller and treasurer they shall determine the amount of the tax due from such information as may be obtainable or on the basis of external indices, such as the number of employees of the person concerned, rentals paid by him, his stock on hand and or other factors. Notice of such determination shall be given to the person liable for the payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed shall, within thirty days, apply to the comptroller for a hearing on such determination, or unless the comptroller and treasurer shall of their own motion redetermine such tax. After such hearing the comptroller shall give notice of his decision to the person liable for the tax. The determination of the comptroller shall be reviewable for error, illegality, unconstitutionality or any other reason whatsoever by a proceeding under article seventy-eight of the Civil Practice Act if instituted within thirty days after the giving of the notice of such

determination. Such proceeding shall not be instituted unless the amount of any tax sought to be reviewed with interest and penalties thereon, if any, shall have first been deposited with the treasurer and an undertaking filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the proceedings.

§R41-7.0. **Refunds.** In the manner herein provided the treasurer upon the order of the comptroller shall refund any tax, interest or penalty erroneously, illegally or unconstitutionally collected by or paid to him, under protest in writing, stating in detail the ground or grounds of the protest, if application to the comptroller therefor shall be made within one year from the payment thereof. For like cause and within the same period a refund may be so made on the initiative and order of the comptroller. Whenever a refund is made by the treasurer, pursuant to the order of the comptroller on the comptroller's own initiative or after a hearing by the comptroller as herein provided, the comptroller shall state his reasons for the refund in writing. A person shall not be entitled to a hearing in connection with such application for a refund if he has already had a hearing or had been given the opportunity of a hearing as provided in section R41-6.0 of this title. No refund shall be made of a tax, interest or penalty paid pursuant to a determination of the comptroller as provided in section R41-6.0 of this title, unless the comptroller, after a hearing as in said section provided, or of his own motion, shall have reduced the tax or penalty, or it shall have been established in a proceeding, pursuant to article seventy-eight of the Civil Practice Act that such determination was erroneous, illegal, unconstitutional or otherwise improper, in which event a refund with interest shall be made as pro-

vided upon the determination of such proceeding. An application to the comptroller for a refund made as herein provided shall be deemed an application for a revision of any tax, interest or penalty complained of and the comptroller shall receive evidence with respect thereto. After making his determination the comptroller shall give notice thereof to the person interested who shall be entitled to maintain a proceeding under article seventy-eight of the Civil Practice Act to review such determination if instituted within thirty days after such determination and an undertaking shall first be filed with the comptroller in such amount and with such sureties as a justice of the Supreme Court shall approve, to the effect that if such order be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of the certiorari proceeding.

§R41-8.0. **Reserves.** In cases where the taxpayer has paid any tax, interest or penalty under written protest stating in detail the ground or grounds therefor, has applied for a refund and has instituted proceedings under article seventy-eight of the Civil Practice Act to review a determination adverse to him on his application for refund, or has deposited the amount of tax assessed in connection with proceedings under section R41-6.0 of this title, the comptroller shall set up appropriate reserves to meet any decision adverse to the city.

§R41-9.0. **Remedies exclusive.** The remedies provided by sections R41-6.0 and R41-7.0 of this title shall be the exclusive remedies available to any person for the review of tax liability imposed by this title; and no determination or proposed determination of tax or determination on an application for refund shall be enjoined or reviewed by an action for declaratory judgment, an action for money had and received, or by any legal or equitable action or pro-

ceeding other than proceedings under article seventy-eight of the Civil Practice Act; provided, however, that a taxpayer may proceed by declaratory judgment if he institutes suit within thirty days after a deficiency assessment is made and pays the amount of the deficiency assessment to the treasurer prior to the institution of such suit and posts a bond for costs as provided in section R41-6.0 of this title.

§R41-10.0. **Proceedings to recover tax.** a. Whenever any person shall fail to pay any tax, penalty, or interest imposed by this title as therein provided, the corporation counsel shall, upon the request of the comptroller or treasurer, bring an action to enforce payment by the taxpayer, who shall be personally liable for the same. If, however, the treasurer in his discretion believes that a taxpayer subject to the provision of this title or of articles eight to twelve inclusive of title E of chapter forty-one of the code is about to cease business, leave the state or remove or dissipate the assets out of which the tax, interest or penalties might be satisfied and that any such tax, interest or penalty will not be paid when due, he may declare such tax, interest or penalty to be immediately due and payable and may issue a warrant immediately.

b. As an additional or alternative remedy the treasurer may issue a warrant, directed to the sheriff of any county within the city, commanding him to levy upon and sell the real and personal property of such person which may be found within his county, for the payment of the amount thereof, with any penalties, interest and the cost of executing the warrant and to return such warrant to the treasurer and to pay him the money collected by virtue thereof within sixty days after the receipt of such warrant. The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof and thereupon such clerk shall enter in the judgment docket the name of the person mentioned in the warrant and the amount of the

tax, penalties and interest for which the warrant is issued and the date when such copy is filed. Thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property of the person against whom the warrant is issued. The sheriff shall then proceed upon the warrant in the same manner and with like effect as that provided by law in respect to executions against property upon judgments of a court of record, and for services in executing the warrant he shall be entitled to the same fees which he may collect in the same manner. In the discretion of the treasurer a warrant of like terms, force and effect may be issued and directed to any officer or employee of the department of finance, and in the execution thereof such officer or employee shall have all the power conferred by law upon sheriffs, but he shall be entitled to no fee or compensation in excess of the actual expenses paid in the performance of such duty. If a warrant is returned not satisfied in full, the treasurer may from time to time issue new warrants and shall also have the same remedies to enforce the amount due thereunder as if the city had recovered judgment therefor and execution thereon had been returned unsatisfied.

§R41-11.0. **General powers of the comptroller.** In addition to the powers granted to the comptroller in this title, he is hereby authorized and empowered:

1. To make, adopt and amend rules and regulations appropriate to the carrying out of this title and the purposes thereof;

2. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York or treasury department of the United States, relative to any person, and to afford information to such tax commission or such treasury department relative to any person, any other provision in this title to the contrary notwithstanding;

3. To extend, for cause shown, the time for filing any return for a period not exceeding thirty days; and, in his discretion, to remit penalties, but not interest at the rate of six per cent per annum; and to compromise disputed claims in connection with the taxes hereby imposed;

4. To require all persons doing business in the city to keep such records as he may prescribe;

5. To delegate his functions hereunder to a deputy comptroller or other employee or employees of the comptroller's office and, with the consent of the treasurer, to the treasurer or employees of the department of finance;

6. To determine whether any trade, business, profession, vocation, or commercial activity shall be in whole or in part classified as financial business or otherwise; and in case any trade, business, profession, vocation or commercial activity shall be classified in part as financial business, to set forth the manner of computing the tax hereunder upon each part in accordance with such classification;

7. To prescribe methods for determining the amount of receipts and/or gross income received by reason of any sale made or service rendered or commercial or business transaction had;

8. To prescribe methods for determining allocations of receipts to the city.

§R41-12.0. **General powers of the treasurer.** In addition to the powers granted to the treasurer in this title he is hereby authorized and empowered:

1. To delegate his functions hereunder to a deputy treasurer or other employee or employees of the department of finance; and, with the consent of the comptroller, to the comptroller or any of his employees;

2. To extend, for cause shown, the time of filing any return for a period not exceeding thirty days; and in such event promptly to notify the comptroller of any extensions;

3. To request information from the tax commission, superintendent of banks, superintendent of insurance and other agencies of the state of New York and of agencies of the United States relative to any person; and to afford information to the tax commission and treasury department relative to any person, any other provision of this title to the contrary notwithstanding.

§R41-13.0. **Administration of oaths and compelling testimony.** a. The comptroller or treasurer or his employee duly designated and authorized by them shall have power to administer oaths and take affidavits in relation to any matter or proceeding in the exercise of their powers and duties under this title. The comptroller or treasurer shall have power to subpoena and require the attendance of witnesses and the production of books, papers and documents to secure information pertinent to the performance of his duties hereunder and of the enforcement of this title, and to examine them in relation thereto, and to issue commissions for the examination of witnesses who are out of the state or unable to attend before him or excused from attendance.

b. A justice of the Supreme Court either in court or at chambers shall have power summarily to enforce by proper proceedings the attendance and testimony of witnesses and the production and examination of books, papers and documents called for by the subpoena of the comptroller or treasurer hereunder.

c. Any person who shall refuse to testify or to produce books or records or who shall testify falsely in any material matter pending before the comptroller or treasurer hereunder shall be guilty of a misdemeanor, and punishment

for which shall be of a fine of not more than one thousand dollars or imprisonment for not more than one year, or both such fine and imprisonment.

d. The officers who serve the comptroller's or treasurer's summons or subpoena hereunder and witnesses attending in response thereto shall be entitled to the same fees as are allowed to officers and witnesses in civil cases in courts of record, except as herein otherwise provided. Such officers shall be the sheriffs of the counties within the city, and their duly appointed deputies.

§R41-14.0. **Penalties and interest.** a. Any person failing to file a return or to pay over any tax to the treasurer within the time required by this title shall be subject to a penalty of five percentum of the amount of tax due, plus interest at the rate of one percentum of such tax for each month of delay or fraction thereof excepting the first month, after such return was required to be filed or such tax becomes due; but the comptroller, if satisfied that the delay was excusable, may remit all or any part of such penalty, but not interest at the rate of six percentum per annum. Such penalty shall be paid and disposed of in the same manner as other revenues from this title. Unpaid penalties and interest may be enforced in the same manner as the tax imposed by this title.

b. Any person and any officer of a corporation or copartnership filing or causing to be filed any return, certificate, affidavit or statement required or authorized by this title which is wilfully false and any person who shall fail to file a return as required under this title, and the officers of any corporation which shall so fail, and any person and any officer of a corporation failing to keep the records required by subdivision four of section R41-11.0 of this title shall be guilty of a misdemeanor, punishment for which shall be a fine of not more than one thousand dollars or

imprisonment for not more than one year, or both such fine and imprisonment. The certificate of the comptroller or treasurer to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied pursuant to the provisions of this title shall be prima facie evidence thereof.

§[illegible]-15.0. **Notices and limitations of time.** a. Any notice authorized or required under the provisions of this title may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this title or in any application made by him, or, if no return has been filed or application made, then to such address as may be obtainable. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this title by the giving of notice shall commence to run from the date of mailing of such notice.

b. The provisions of the Civil Practice Act or any other law relative to limitations of time for the enforcement of a civil remedy shall not apply to any proceeding or action taken by the city to levy, appraise, assess, determine or enforce the collection of any tax, interest or penalty provided by this title. However, except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made after the expiration of more than three years from the date of the filing of a return, provided, that where no return has been filed as provided by law the tax may be assessed at any time.

c. Where, before the expiration of the period prescribed herein for the assessment of an additional tax, a taxpayer has consented in writing that such period be extended, the

amount of such additional tax due may be determined at any time within such extended period. The period so extended may be further extended by subsequent consents in writing made before the expiration of the extended period.

§R41-16.0. **Returns to be secret.** Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the comptroller or treasurer or any officer or employee of the comptroller's office or the department of finance to divulge or make known in any manner the receipts or any other information relating to the business of a taxpayer contained in any return required under this title. The officers charged with the custody of such returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the state, the city or the comptroller or treasurer or on behalf of any party to any action or proceeding under the provisions of this title when the returns or facts shown thereby are directly involved in such action or proceeding in either of which events the court may require the production of, and may admit in evidence, so much of said returns or of the fact shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular returns and the items thereof, or the inspection by the corporation counsel of the city or other legal representatives of the city of the return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted for the collection of a tax or penalty. Returns shall be preserved for three years and thereafter until the comptroller orders them to be destroyed.

Appendix A

§R41-17.0. **Separability.** If any provision of this title, r the application thereof to any person or circumstances is, eld invalid, the remainder of this title, and the application f such provisions to other persons or circumstances shall ot be affected thereby.

§R41-18.0. **Construction and enforcement.** This title hall be construed and enforced in conformity with chapter ight hundred seventy-three of the laws of nineteen hun-ired thirty-four as amended, pursuant to which it is en-cted.

§2. This local law shall take effect July first, nineteen undred forty.

APPENDIX B

Provisions of State Enabling Act

LAWS OF NEW YORK

1940

CHAPTER 245

AN ACT to amend chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," in relation to authorizing specified types of taxes for relief and welfare and providing for the review thereof

Became a law March 30, 1940, with the approval of the Governor. Passed, on message of necessity, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Sections one and two of chapter eight hundred and seventy-three of the laws of nineteen hundred thirty-four, re-entitled by chapter six hundred and fifty-nine of the laws of nineteen hundred-thirty-nine "An act to enable, temporarily, any city of the state having a population of one million inhabitants or more to adopt and amend local laws, imposing certain specified types of taxes which the legislature has or would have power and authority to im-

pose to relieve the people of any such city from the hardships and suffering caused by unemployment, to provide for the review of such taxes, and to limit the application of such local laws," as last amended by chapter six hundred and fifty-nine of the laws of nineteen hundred thirty-nine, are hereby amended to read as follows:

Section 1. Notwithstanding any other provisions of law to the contrary, any city of the state having a population of one million inhabitants or more acting through its local legislative body, is hereby authorized and empowered until July first, nineteen hundred forty-one to adopt and amend local laws imposing in any such city any or all of the following types of taxes which the legislature has or would have power and authority to impose to relieve the people of any such city from the hardships and suffering caused by unemployment; such taxes to be collected and administered by the fiscal officers of such city in the same manner as other taxes which are now collected and administered by such officers in accordance with the charter or administrative code of any such city: (a) Taxes on the use, sale, exchange, transfer, storage, withdrawal, retention, installation or license to use or consume tangible personal property, other than, on or after July first, nineteen hundred forty, cigarettes.

(b) Taxes on the privilege of doing any business, engaging in any trade, calling, occupation or profession; owning, holding or occupying any property; possessing or exercising any franchise or franchises; or on the gross receipts from sales to persons within such city.

(c) Taxes on the sale or performance of services including utility services but excluding professional services.

The tax or taxes imposed pursuant to such local laws shall be effective only during the period commencing when this act becomes effective and ending July first, nineteen

hundred forty-one, or any portion of such period. A tax imposed hereunder shall have application only within the territorial limits of any such city and shall be in addition to any and all other taxes.

This act shall not authorize the imposition of a tax on incomes or upon the transfers of estates of deceased persons, or upon the gross income from the operation of hotels, multiple dwellings or office buildings by persons in the business of operating or leasing sleeping or parlor railroad cars or of operating railroads other than street surface, rapid transit, subways and elevated railroads, or upon gross incomes or gross operating incomes of persons subject to taxation under the provisions of section one hundred eighty-six-a of the tax law, except in accordance with the provisions of section twenty-b of the general city law; or upon interest or dividends received from a corporation by a person referred to in this paragraph.

This act shall not authorize the imposition of a tax on any transaction, originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits.

This act shall not authorize the imposition of a tax on a non-resident of such city or on account of any transaction by or with a non-resident of such city, except when imposed without discrimination as between residents and non-residents, on account of tangible property actually located or income earned, or trades, businesses or professions carried on within such city, or on account of transfers, retail sales or other transactions actually made or consummated within such city by a non-resident while within such city. A corporation shall not be deemed a non-resident by reason of the fact its principal place of business is not within the city.

Except as expressly otherwise in this act provided, nothing herein contained shall limit or prevent the imposition

f a tax on gross incomes or a tax on gross receipts of persons, firms and corporations doing business in any such ity.

No such person, firm or corporation, however, shall be ubject to the imposition of more than one tax by any such ity on gross income or gross receipts for the privilege of oing business under the provisions of this act.

A person who has a permanent place of abode without uch city and lives more than seven months of the year out f such city shall be deemed a non-resident within the mean ng of this act.

Any final determination of the amount of any tax payble hereunder shall be reviewable for error, illegality or nconstitutionality or any other reason whatsoever by a roceeding under article seventy-eight of the civil practice ct if application therefor is made to the supreme court ithin thirty days after the giving of the notice of such inal determination, provided, however, that any such proceeding under article seventy-eight of the civil practice ct shall not be instituted unless the amount of any tax ought to be reviewed, with such interest and penalties hereon as may be provided for by local law or regulation, hall be first deposited and an undertaking filed, in such mount and with such sureties as a justice of the supreme ourt shall approve to the effect that if such proceeding be ismissed or the tax confirmed the petitioner will pay all osts and charges which may accrue in the prosecution of uch proceeding.

Where any tax imposed hereunder shall have been erroneusly, illegally or unconstitutionally collected an applicaion for the refund thereof duly made to the proper fiscal fficer or officers, and such officer or officers shall have made determination denying such refund, such determination hall be reviewable by a proceeding under article seventyight of the civil practice act, provided, however, that such

proceeding is instituted within thirty days after the giving of the notice of such denial, that a final determination of tax due was not previously made, and that an undertaking is filed with the proper fiscal officer or officers in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding.

Except in the case of a wilfully false or fraudulent return with intent to evade the tax, no assessment of additional tax shall be made with respect to taxes imposed under local laws enacted prior to July first, nineteen hundred thirty-eight, after July first, nineteen hundred forty-one, and with respect to taxes imposed under local laws enacted subsequent to July first, nineteen hundred thirty-eight, after the expiration of more than three years from the date of the filing of a return, provided however, that where no return has been filed as provided by law the tax may be assessed at any time.

§ 2. Revenues resulting from the imposition of taxes authorized by this act shall be paid into the treasury of any such city and shall not be credited or deposited in the general fund of any such city, but shall be deposited in a separate bank account or accounts and shall be available and used solely and exclusively for paying the principal amount of any installment of principal and of interest due during the aforesaid period on account of the ten-year serial bonds sold to obtain moneys to pay for home relief and work relief in any such city in the month of November, nineteen hundred thirty-three; for defraying the cost of collecting and administering such taxes, but not in excess of such cost, during the year immediately preceding; and for the relief purposes for which such taxes have been imposed under the provisions of this act.

Appendix B

Notwithstanding the foregoing limitations, a sum not to
xceed four million five hundred thousand dollars may be
pended for old age assistance by any such city from the
xes imposed and collected hereunder prior to the first day
f July, nineteen hundred forty.

Such legislative body may authorize the performance of
ublic work for the relief purposes aforesaid to be paid for
t of the tax or taxes imposed under this act and which
ay be undertaken other than by contract by such municipal
rporation, during the period aforesaid, through and un-
r its welfare or other department.

The provisions of this act shall be effective notwithstand-
g any provisions contained in any charter, or in any gen-
ral, special or local laws to the contrary, and notwithstand-
g any such provisions therein contained requiring such
ork as may be undertaken to be let by contract.

§ 2. This act shall take effect immediately.

APPENDIX C

Provisions of Article 2-B of General City Law (Enabling Act for Local Law No. 47 of 1941)

LAWS OF NEW YORK

1941

Chapter 199

AN ACT to amend the general city law, to enable certain cities to impose and collect taxes on certain businesses

Became a law March 28, 1941, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-six of the laws of nineteen hundred nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," is hereby amended by adding thereto a new article, to be article two-B, to read as follows:

ARTICLE 2-B

GENERAL BUSINESS AND FINANCIAL TAX AUTHORIZATION

Section 24-a. Certain cities authorized to impose taxes on certain businesses

24-b. Authority to impose other taxes; limitations.

24-c. Revenues; disposition of.

§ 24-a. **Certain cities authorized to impose taxes on certain businesses.** Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, until July first, nineteen hundred forty-four, shall have

power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales to persons within such city, measured by the gross receipts from such activities carried on or sales made within the city, but not to exceed one-twentieth of one per centum of such gross receipts, and upon persons carrying on within any such city, any financial business, measured by the gross income from such financial business carried on within such city, but not to exceed one-tenth of one per centum of such gross income. In any such city in which the functions of the chief fiscal officer are divided between two or more officials, any such local law may assign the respective functions of each such official in assessing and collecting the tax. Every such local law in terms shall be, substantially, as follows:

GENERAL BUSINESS AND FINANCIAL TAX

(NOTE:—*Here follows the prescribed model law which is practically verbatim the provisions of the local law [Title R of the Administrative Code of the City of New York] set forth in Appendix A, pages 22 to 37,* supra.)

§24-b. **Authority to impose other taxes; limitations.** Nothing in this article contained shall limit the power of any city to adopt or amend local laws imposing the tax authorized by section twenty-b of this chapter, as amended, or by chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as amended.

Nothing in this article contained shall be construed to refer to or authorize a tax such as is authorized to be imposed by subdivision b of section one of chapter eight hundred seventy-three of the laws of nineteen hundred thirty-four, as last amended, upon (a) the gross income of persons subject to the supervision of either division of the department of public service; (b) the gross income of persons engaged in the business of operating or leasing sleeping

and parlor railroad cars or operating railroads other than street surface, rapid transit, subway and elevated railroads; (c) the gross operating income of persons engaged in the business of operating omnibuses with a carrying capacity of more than seven persons who are not subject to the supervision of either division of the department or public service; (d) the gross income of persons constructing, owning, operating, managing or leasing electrical subways, conduits, ducts, subsidiary connections or similar structures and equipment upon, above, or under any public or private street, public or private avenue, highway, public or private place, road or ground in any such city, through which are run electrical conductors, either low or high tension, by itself, or by any person engaged in the business of affording telephonic or telegraphic communication for hire or in the business of manufacturing, generating, distributing or transmitting electricity; or (e) the gross operating income of persons not subject to the supervision of either division of the department of public service but furnishing or selling gas, electricity, steam, water, refrigeration, telephony or telegraphy, or furnishing or selling gas, electric, steam, water, refrigeration, telephone or telegraph service, or operating omnibuses (whether or not such operation is on the public streets), regardless of whether such furnishing or selling or operation constitutes the main activity of such person or is merely incidental thereto.

§24-c. **Revenues; disposition of.** Revenues resulting from the imposition of taxes authorized by this article two-b shall be paid into the treasury of the city imposing the same and may be credited to or deposited in the general fund of such city.

§2. Article two-b of such chapter, as added by chapter five hundred and two of the laws of nineteen hundred twenty-one, as amended by chapter six hundred and four of the laws of nineteen hundred twenty-three is hereby renumbered to be article two-c.

§3. This act shall take effect immediately.

Office - Supreme Court, U. S.
FILED
JAN 24 1946
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALBERTSON PATTERSON, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR PETITIONERS

January 23, 1946.

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners,
Municipal Building,
New York 7, N. Y.

ISAAC G. DOUGHERTY,
HARRY KAUFF,
of Counsel.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	2
Statement of the Case	3
1. Facts	3
2. The Tax Statutes Here Involved	4
3. Provisions of Statutes Involved	5
4. History of the Tax Involved	5
Specification of Errors	7
The Issue	8
Argument	9
Conclusion	10

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938)	8
Clark & Son, Matter of John T., v. McGoldrick, 294 N. Y. 908 (1945)	2
Clark & Son, Matter of John T., v. McGoldrick, 269 App. Div. 685 (1945)	2
Gwin, White & Prince, Inc. v. Henneford, 305 U. S. 434 (1939)	8
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940)	7, 8

PAGE

McGoldrick et al. v. Carter & Weekes Stevedoring Co., No. 518 ..... 3, 9, 10

New York Rapid Transit Co. v. City of New York, 303 U. S. 573 (1938) 7

Puget Sound Co. v. Tax Commission, 302 U. S. 90 (1937) 7, 8, 9, 10

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 7, 8, 10

Other Authority Cited

Report, Commission on Municipal Revenues and Reduction of Real Estate Taxes (March 13, 1945) 6

Statutes Cited

Administrative Code of the City of New York, Chap. 41:

Title O 4
Title R 4, 5
Title RR 4

New York City Laws:

Local Law No. 9 of 1934 5
Local Law No. 20 of 1938 4
Local Law No. 103 of 1939 4
Local Law No. 78 of 1940 4
Local Law No. 87 of 1941 4

New York Constitution:

Article XVI, Section 1 ..... 4n

PAGE

New York Laws:

Civil Practice Act, Art. 78 2
General City Law, Art. 2-B 4, 5
Laws of 1933, ch. 815 6
Laws of 1934, ch. 302 5
Laws of 1934, ch. 873 4
Laws of 1938, ch. 444 4
Laws of 1939, ch. 659 4
Laws of 1940, ch. 245 ..... 4, 6
Laws of 1941, ch. 199 4
Laws of 1944, ch. 382 6

United States Code, Tit. 28, Sec. 344, subd. (b) 2

United States Constitution:

Commerce Clause (Art. 1, §8, cl. 3) 2, 7, 8, 9, 10

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

---

BRIEF FOR PETITIONERS

A writ of certiorari was granted by this Court on November 19, 1945, to review a final order of the Court of Appeals of the State of New York (R. 125-126) affirming a final order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department (R. 123-124), which nullified a determination of the petitioner-Comptroller denying respondent's application for refund of gross receipts taxes, and penalties thereon, paid under the New York City general business tax laws for the years 1938 to 1941. The amount involved is $4,942.37, consisting of $4,770.23 tax, and $172.14 penalties (R. 14).

The Court of Appeals nullified the Comptroller's determination upon the sole ground that the application of the New York City general business tax to the respondent's stevedoring business constituted a violation of the Commerce Clause (Art. 1, §8, cl. 3) of the Federal Constitution (R. 125).

Opinions Below

The Court of Appeals affirmed the determination of the Appellate Division without opinion. Its memorandum of affirmance is reported in 294 N. Y. 908 (1945).

The memorandum opinion of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, before which the proceedings to review the Comptroller's determination were heard in the first instance (R. 1-2), pursuant to Article 78 of the New York Civil Practice Act, is reported in 269 App. Div. 685 (1945) and reads as follows (R. 124):

> "Determination of the Comptroller of the City of New York unanimously annulled, with $50 costs and disbursements to the petitioner, and the respondents directed to refund petitioner's deposit, with interest on the authority of Puget Sound Stevedoring Co. v. Tax Commission (302 U. S., 90)".

Jurisdiction

The jurisdiction of this Court arises under U. S. Code, Title 28, §344, subd. (b). The decision of the Court of Appeals was based solely upon the ground that the tax as applied to respondent violated the Commerce Clause (R. 125). The decision of the Court of Appeals was rendered on July 19, 1945 (R. 125). The petition in this Court was filed on October 17, 1945 (R. 130), within three months of the decision of the Court of Appeals.

The petition was granted on November 19, 1945 (R. 130), concurrently with the granting of the petition filed by petitioners in *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, which involves exactly the same question and will be argued at the same time as this case.

Statement of the Case

1. Facts

The respondent is a New York corporation engaged in the business of general stevedoring, which consists of loading and unloading ships' cargoes and the contents of railroad freight cars, moving in interstate and foreign commerce (R. 19, 46, 50), and the performance of other services, such as cleaning of docks, passenger waiting rooms, and the offices of the steamship companies it serves (R. 59). Its sole office is in the City of New York (R. 49) and all its activities are performed within the territorial limits of the City of New York (R. 53-54, 61), except a very small portion of its services (yielding a tax of $488.36* out of a total tax of $4,770.23), which are performed in New Jersey.

The petitioners did not in the New York State courts and do not here press the issue of the taxability of the receipts for New Jersey services. The petitioners limit themselves here as they did in the State courts solely to the question of the taxability of the respondent on its gross receipts from its activities performed wholly within the territorial limits of the City of New York.

None of the activities sought to be taxed, nor any part of them, is carried on outside the territorial limits of the City. All of the respondent's contracts for its services are made in New York City (R. 49-50). Its shops for the repair of its machinery are located in the City (R. 50).

*Arrived at by applying the tax rates under the various local laws to the New Jersey receipts as shown by the record (R. 53-54).

The taxpayer is paid by its customers, *i.e.*, the steamship companies, only for its stevedoring services and only these receipts from its own activities in the City are sought to be taxed (R. 22, 28-31).

2. The Tax Statutes Here Involved

The statutes, the constitutionality of which is involved, are the New York City general business and financial tax laws for the years 1938 to 1941, Local Laws No. 20 of 1938, No. 103 of 1939, No. 78 of 1940 and No. 47 of 1941 (constituting Titles O, R and RR of Chapter 41 of the Administrative Code of the City of New York). The provisions of Local Law No. 78 of 1940 (Title R of Chapter 41 of the Administrative Code), which, so far as the issues herein are concerned, are substantially the same as the provisions of the other local laws involved, are set out in full as Appendix A in the Appendix of Statutes to be submitted herewith.

The first three of these local laws were enacted pursuant to authority conferred upon the City of New York by Laws of New York of 1934, ch. 873, as annually amended in each of the years 1938 to 1940, inclusive (L. 1938, ch. 444; L. 1939, ch. 659; L. 1940, ch. 245). The provisions of the 1940 State enabling act pursuant to which Local Law No. 78 of 1940 was enacted (L. 1940, ch. 245) are set out in full as Appendix B in the Appendix of Statutes.*

Since 1941 the authority of the City to impose this type of tax derived from Article 2-B of the General City Law of the State of New York, which was added to the General City Law by Laws of New York of 1941, ch. 199. Article 2-B confers this authority by prescribing a model general business tax law which the City is authorized to adopt.

* The provisions of the 1940 enabling act are substantially the same as those of the 1939 enabling act, but differ somewhat from the 1938 act. The changes from the 1938 act were made necessary by a new provision of the New York State Constitution (Article XVI, Section 1), effective January 1, 1939. These changes do not affect the issues in this case.

This model law was copied practically verbatim from the City's 1940 general business tax law set out in Appendix A. The provisions of Article 2-B, except for the model law, are set forth as Appendix C of the Appendix of Statutes.

3. Provisions of Statutes Involved

The New York City general business tax is imposed upon all persons "carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity" (Title R, ch. 41 of the Administrative Code, §R41-2.0 [Appendix A]). Under the local laws of 1938, 1939 and 1940 it was imposed at the rate of 1/10%, and under the 1941 law at the rate of 1/20%, on all receipts "received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity" (§R41-2.0). Receipts are defined as "the gross receipts received in or by reason of any sale made or services rendered or commercial or business transaction had in the city" (§R41-1.0, par. 3). The City general business tax law has a provision (§R41-2.0, par. b) authorizing the Comptroller, in situations where a receipt cannot validly be taxed in its entirety by reason of the provisions of the Constitution of the United States or otherwise, to provide for allocation of such receipt "to the end that only that part of such receipt which is properly attributable and allocable to the doing of business in the City shall be taxed hereunder". Since the respondent's activities sought to be taxed herein take place wholly within the City of New York, all its receipts from these activities are attributable to local business without recourse to this allocation provision. The respondent, therefore, is not affected by this provision.

1. History of the Tax Involved

The first New York City general business tax was imposed by Local Law No. 9 of 1934, enacted pursuant to authority conferred by Laws of New York of 1934, ch.

302. Local laws imposing these taxes have been and continue to be renewed and extended annually up to the present time, pursuant to subsequent State enabling acts authorizing them.

The first such enabling act was passed in 1933 (L. 1933, ch. 815). No general business tax was imposed by the City under this first enabling act. Prior to these enabling acts, the City's taxing authority was limited to taxes on real estate. The enabling acts extended the City's taxing authority, permitting it to impose other types of taxes in order "to relieve the people from the hardships and suffering caused by unemployment" (see, *e.g.*, L. 1940, ch. 245 [Appendix, p. 18]). The City's need for additional tax revenue from sources other than real property is reflected in the following excerpt from the report, dated March 13, 1945, of the Commission on Municipal Revenues and Reduction of Real Estate taxes (created by L. 1944, ch. 382),* at page 15:

> "With declining assessed valuations and sharply curtailed income from shared taxes, the municipalities found themselves confronted with the necessity of raising the moneys required not only to meet their normal costs of government but also to pay the debt service upon the huge borrowings accumulated in the twenties and to provide vastly increased relief and welfare services to their citizens. Real estate tax delinquencies pyramided rapidly."

And further, at page 20:

> "Experience in the depression years demonstrates that the gap between mounting costs and declining

* The problem of relieving real estate of the burden of taxation in New York State has been the subject of legislative and other official study for many years. The Commission referred to is the last of many which considered the problem. During the period from 1916 to 1938 twenty-one commissions were appointed to devise a more equitable revenue system for the State and its subdivisions. Since 1938 several other commissions have inquired into one or more phases of the subject. See, Report, Commission on Municipal Revenue and Reduction of Real Estate Taxes, March 13, 1945, p. 11.

revenues cannot, and should not, be bridged by imposing upon real estate an additional burden of debt and taxation."

The general business tax here involved is one of a series of taxes which the City of New York enacted pursuant to the enabling legislation. These taxes include, amongst others, the New York City sales tax which was reviewed and upheld by this Court in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and the New York City utility tax which was reviewed and upheld by this Court in *New York Rapid Transit Co.* v. *City of New York*, 303 U. S. 573 (1938).

All of these taxes have been continued up to the present time by reenactment under periodic extensions of the enabling acts. In 1942 the restriction, which until then limited the use of the revenues from these taxes for relief purposes only, was lifted. Since that time the City has been permitted to treat the revenues as part of its general funds, thus making possible the reduction of the real estate tax load borne by local real property owners.

Specification of Errors

Petitioners contend that the Court of Appeals erred:

(a) In failing to hold that the New York City general business tax was validly imposed upon respondent's receipts here involved, under the recent decisions of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and later cases.

(b) In following the decision of this Court in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and accepting the holding in that case rather than the principles enunciated in *Western Live Stock* v. *Bureau of Revenue, supra*, and subsequent cases, as controlling on the question of the validity under the Commerce Clause of the City general business tax as applied to the respondent.

(c) In holding that the City general business tax as applied to respondent's receipts from its stevedoring activities here sought to be taxed constituted an unconstitutional burden on interstate commerce.

(d) In regarding itself as compelled by the Commerce Clause to affirm the determination of the Appellate Division and to annul the Comptroller's determination denying respondent's application for refund of City general business taxes paid by it on its receipts from its stevedoring activities carried on wholly within the territorial limits of the City.

The Issue

The question presented is whether the New York City general business tax imposed upon the respondent's gross receipts from its stevedoring activities carried on wholly within the territorial limits of the City of New York is invalid under the Commerce Clause.

Respondent contends that the holding of *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937),* is decisive of this case and that under that holding the tax here involved is invalid.

Petitioners contend that the case at bar is controlled by holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and subsequent cases including, *inter alia*, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939), and *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), and that under these cases

* In the *Puget Sound* case the State tax there involved was held valid as to certain activities of the taxpayer regarded by the Court as not in interstate commerce. The tax was held invalid as to the taxpayer's stevedoring activities which were held to be interstate commerce (See 302 U. S., at 94). It is only the latter holding which is pertinent to the instant case. Where the *Puget Sound* holding or decision, etc., is referred to in this brief, it is the latter holding only that is intended.

the tax is valid. Petitioners contend also that the *Puget Sound* case has been rejected as authority and in effect overruled.

Argument

This case presents the identical issue involved in the companion case of *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, which will be argued at the same time. In our brief in that case we discussed at length the principles and authorities which are also applicable to the case at bar. In so far as the receipts here sought to be taxed are concerned, the facts in this case are indistinguishable from the facts in the companion case. The tax upon the receipts from the relatively small portion of respondent's stevedoring services performed in New Jersey is not in issue here.*

Copies of our brief in *McGoldrick et al.* v. *Carter & Weekes Stevedoring Company*, No. 518, have been served upon counsel for the respondent in this case, who also appear as counsel for Carter & Weekes Stevedoring Company in the companion case.

In that brief we demonstrated that the New York City general business tax, which applies generally and without discrimination to all business activities carried on within the City, is properly imposed upon the respondent's gross receipts from its stevedoring activities carried on solely and exclusively within the City. The tax is not barred by the Commerce Clause because it does not regulate interstate commerce. The tax does not discriminate against interstate commerce, is commensurate only with wholly local activity, and does not subject that commerce to the possibility of multiple tax burdens. The tax merely exacts from interstate commerce the same fair contribution toward the support of local government as is exacted from intrastate business.

* See page 3, *supra*.

This case is controlled by the principles of *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938) and subsequent cases, and not by the decision in *Puget Sound Co.* v. *Tax Commission*, 302 U. S. 90 (1937). The *Western Live Stock* and later cases comply with the basic principles laid down by this Court for determining the validity of State taxes under the Commerce Clause, whereas the *Puget Sound* case fails to comply with those basic principles. Moreover, the *Puget Sound* case has in effect been rejected and overruled by this Court.

In order to avoid unnecessary repetition we respectfully refer the Court to our brief in the companion case, No. 518, for our complete argument.

CONCLUSION

The final order and judgment should be reversed and the petitioner-Comptroller's determination reinstated.

Dated: New York, N. Y., January 23, 1946.

Respectfully submitted,

JOHN J. BENNETT,
Corporation Counsel
of the City of New York,
Counsel for Petitioners.

ISAAC C. DONNER,
HARRY KATZ,
of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 514

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

ROGER S. BALDWIN,
Counsel for Respondent,
120 Broadway,
New York, N. Y.

SAMUEL M. LANE,
E. RAYMOND SHEPARD,
of Counsel.

BOWNE & CO., NEW YORK CITY

INDEX

	PAGE
Statement	1
Opinions Below	2
Jurisdiction	2
Question Presented by the Petitioners	2
I. This Court has never receded from its holding in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), that gross receipts from transportation in interstate commerce may not be subjected to local taxation	3
II. The Commerce Clause was intended to protect interstate commerce from the cumulative burden of local taxes	6
Conclusion	8

Table of Cases Cited

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938)	4
Allied Mills, Inc. v. Department of Treasury, 318 U. S. 740 (1943)	6
Clark & Son, Matter of John T., v. McGoldrick, 269 App. Div. 685 (1945)	2
Clark & Son, Matter of John T., v. McGoldrick, 294 N. Y. 908 (1945)	2
Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U. S. 604 (1938)	4
Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941)	6
Department of Treasury v. Ingram-Richardson Mfg. Co., 313 U. S. 252 (1941)	6
Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939)	4, 8
International Harvester Co. v. Department of Treasury, 322 U. S. 340 (1944)	6

PAGE

McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33 (1940) 5, 7

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 (1937) 1, 2, 3, 4, 5, 6, 8

Southern Pacific R. R. Co. v. Gallagher, 306 U. S. 167 (1939) 5

Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 3, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. McGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

Statement

The issue in this case is whether the City of New York can levy a tax upon gross receipts derived by respondent from loading and unloading, at piers located within the City of New York, vessels engaged exclusively in interstate and foreign commerce.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held that the State of Washington could not levy such a tax.

Respondent is a New York corporation engaged in the general stevedoring business (R. 27-28). During the years

1938-1941, inclusive, it loaded and unloaded steamships at piers located within the City of New York* (R. 30).

All of the ships were engaged in interstate or foreign commerce (R. 63; 66; 68-69).

Petitioners levied a tax upon this business measured by respondent's gross receipts and respondent, paying the tax under protest, brought this proceeding for refund.

Opinions Below

On the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the New York Supreme Court, Appellate Division, First Department, unanimously annulled the determination of the Comptroller of the City of New York, denying respondent's application for refund, and directed that the refund be made (269 App. Div. 685 (1945)) (R. 181).

The order of the Appellate Division was unanimously affirmed by the New York Court of Appeals without opinion (294 N. Y. 908 (1945)).

Jurisdiction

Respondent concedes the jurisdiction invoked by the petitioners.

Question Presented by the Petitioners

Since the facts in this case, in so far as they relate to the taxation of gross receipts from loading and unloading ships in interstate commerce, are identical with the facts

* Respondent also carried on stevedoring operations outside of the City of New York, in Hoboken, New Jersey, and elsewhere, which petitioners also taxed, but petitioners apparently now concede that this tax was improper (Petition, par. 8, p. 5), and so we will treat the case as if respondent's activities took place within the City of New York and as if the only tax in question was the tax measured by the gross receipts from the New York activities.

in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), the sole question presented by petitioners is whether the *Puget Sound* case is still good law.

What petitioners seek, in effect, is a reargument of the *Puget Sound* case. We respectfully submit that there is no occasion for it.

POINT I

This Court has never receded from its holding in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), that gross receipts from transportation in interstate commerce may not be subjected to local taxation.

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court held, without a dissent, that "a tax laid upon the business of a stevedoring company, the amount to be measured by a percentage of the gross receipts" was invalid under the Commerce Clause in so far as the receipts were derived from loading and unloading ships in interstate commerce. Mr. Justice CARDOZO, writing for the unanimous Court, said at page 94:

> "The business of loading and unloading being interstate or foreign commerce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts."

In the *Puget Sound* case itself and in subsequent decisions commencing with *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), this Court sustained taxes on gross receipts from local activities, which, though related to interstate commerce, were separate and distinct therefrom, but it has never sustained such a tax where the local activities consisted entirely of the transportation and movement of goods in interstate commerce.

In the *Western Live Stock* case, *supra*, where this Court

sustained a tax imposed by the State of New Mexico on gross receipts derived from the sale of advertising space in a magazine which had an interstate circulation, Mr. Justice STONE, writing for the majority, pointed out that, although "taxation of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce" is valid (p. 253), "local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional" (p. 255).

In *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604 (1938), where this Court sustained a tax imposed by the State of Louisiana based on the horsepower of engines used to propel natural gas through interstate pipe lines, Mr. Justice REED, writing for the majority, clearly differentiated between a tax levied on articles "withdrawn from the transportation movement" and a tax levied on transportation itself (p. 610), and cited the *Puget Sound* case in a footnote to illustrate the type of tax which "has frequently met the condemnation of this Court as a regulation of commerce" (p. 609).

In *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), where this Court invalidated an Indiana gross income tax as applied to interstate sales, Mr. Justice ROBERTS, writing for the majority, also cited the *Puget Sound* case in a footnote to illustrate the type of tax which this Court has repeatedly held to be a "regulation of, and a burden upon, interstate commerce prohibited by Article I, Section 8, of the Constitution" (p. 311).

In *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939), where this Court, for at least the third time, struck down the State of Washington gross receipts tax as applied to receipts from interstate commerce, Mr. Justice STONE, writing for the majority, said:

> "We need not stop to consider which, if any, of appellant's activities in carrying on its business are

> in themselves transportation of the fruit in interstate or foreign commerce. For the entire service for which the compensation is paid is in aid of the shipment and sale of merchandise in that commerce. Such services are within the protection of the commerce clause, * * *" (p. 437).

In a separate, concurring opinion, Justice BUTLER and McREYNOLDS cited the *Puget Sound* case (p. 442).

In *Southern Pacific R. R. Co.* v. *Gallagher*, 306 U. S. 167 (1939), where this Court sustained a use and storage tax levied by the State of California, Mr. Justice REED, writing for the majority, said:

> "Two lines of authority aid in considering the effect of this tax on commerce. The first makes it quite clear that a state tax upon the privilege of operating in, or upon carrying on, interstate commerce is invalid. States cannot tax interstate telegraph messages, or freight shipments. * * * A tax act as applied to the business of interstate communication is unconstitutional. * * * This rule is applicable to a tax on gross receipts from interstate transportation; * * *" (pp. 174-175).

Referring to the *Puget Sound* case, Justice REED said:

> "* * * the distinction in the opinion between stevedoring in loading and unloading interstate cargoes, held nontaxable as a burden upon commerce, and the business of supplying longshoremen for others to load and unload, held taxable as a local business, is applicable here. The invalid tax in the Puget Sound Stevedoring Co. case was on the business of stevedoring, measured by a percentage of gross receipts from interstate activity. The valid tax was a similar percentage on the local activity as an employment agency" (pp. 178-179).

In *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33 (1940), where this Court sustained a sales tax levied by the City of New York on the sale in New York

City of coal mined in Pennsylvania, Mr. Justice STONE, writing for the majority, said:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey * * *" (p. 48).

Petitioners also cite *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941); *Department of Treasury* v. *Ingram-Richardson Mfg. Co.*, 313 U. S. 252 (1941); *Allied Mills, Inc.* v. *Department of Treasury*, 318 U. S. 740 (1943) and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944). All of these cases deal with the Indiana gross receipts tax and none of them bears upon the constitutionality of a tax upon transportation itself.

We submit that this Court has never questioned its holding in the *Puget Sound* case. On the contrary, it has repeatedly recognized in its later decisions that a state or local tax on gross receipts derived from the transportation and movement of goods in interstate commerce is invalid under the Commerce Clause.

POINT II

The Commerce Clause was intended to protect interstate commerce from the cumulative burden of local taxes.

Petitioners state in their brief (p. 18), "In the case at bar there is no possibility of a burden of cumulative

multiple taxation". Their argument is that because respondent's business activities are confined to the City of New York they are beyond the reach of the taxing authorities of any other State or municipality and hence there is no possibility of this particular respondent being subjected to any additional tax burden.

But the test is not whether the taxpayer is subjected to the risk of multiple taxation but whether interstate commerce is, or can be, subjected to the burden of cumulative multiple taxes regardless of the number of persons on whom the taxes are imposed. The rule against multiple taxation is for the protection of the interstate commerce, not the individual taxpayer.

In *Western Live Stock* v. *Bureau of Revenue, supra,* Mr. Justice STONE said:

> "The vice characteristic of those (taxes) which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed * * * with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce."

In *McGoldrick* v. *Berwind-White Coal Mining Co., supra,* Mr. Justice STONE, referring to taxes on interstate transportation or communication, said:

> "Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce" (p. 48).

It was to prevent just such an accumulation of tax burdens upon interstate commerce that the Commerce

Clause was inserted in the Constitution. As Mr. Justice BLACK pointed out in his dissenting opinion in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, 452:

> "The 'disastrous experiences under the Confederation when the states vied in discriminatory measures against each other' united the Constitutional Convention in the conviction that some branch of the Federal Government should have exclusive power to regulate commerce among the States and with foreign nations."

Petitioners miss the point entirely when they assert that there is no possibility of cumulative multiple taxation forbidden by the Commerce Clause merely because this respondent's local business activities cannot be taxed by any other taxing authority.

Conclusion

The doctrine of the *Puget Sound* case remains unimpaired by the subsequent decisions of this Court on which the petitioners rely. The *Puget Sound* case is decisive of the present case and no sound reason exists for a review of the present case by this Court. The petition for certiorari should be denied.

November 8, 1945.

Respectfully submitted,

ROGER S. BALDWIN,
Counsel for Respondent,
120 Broadway,
New York, N. Y.

SAMUEL M. LANE,
E. RAYMOND SHEPARD,
of Counsel.

FILE COPY

FILED
FEB 26 1945
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

ROGER S. BALDWIN,
Counsel for Respondent.

SAMUEL M. LANE,
BLISS ANSNES,
of Counsel.

INDEX

PAGE

Statement of the Case 2

POINT I.—The imposition of the tax on respondent's New Jersey receipts is not only unauthorized by the Enabling Act but is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States 6

POINT II.—The imposition of the Tax violates Article I, Section 8, Clause 3 of the Constitution of the United States 7

POINT III.—The imposition of the tax is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States 29

POINT IV.—The imposition of the tax violates Article I, Section 10, Clause 2 of the Constitution of the United States 31

POINT V.—The imposition of the tax constitutes an unlawful interference with the paramount power of Congress over navigation upon the navigable waters of the nation 33

CONCLUSION.—Respondent respectfully submits that the final order and judgment of the lower court directting the refund of the tax in question should be affirmed 35

Cases Cited.

PAGE.

Adams Mfg. Co. v. Storen, 304 U. S. 307 (1938) 20, 22, 23, 27
Almy v. California, 24 How. 169 (1861) 8
American Mfg. Co. v. St. Louis, 250 U. S. 459 (1919) 20

Bass, Ratcliff & Grettan, Ltd. v. State Tax Commission, 266 U. S. 271 (1924) 25
Brown v. Maryland, 12 Wheat. 419 (1827) 13, 32, 33

Carson Petroleum v. Vial, 279 U. S. 95 (1929) 9, 10, 26
Champlain v. Brattleboro, 260 U. S. 366 (1922) 9, 10
Coe v. Errol, 116 U. S. 517 (1886) 10
Cooley v. Board of Wardens, 12 How. 299 (1851) 14, 25
Cooney v. Mountain States Tel. & Tel. Co., 294 U. S. 384 (1935) 9
Crandall v. Nevada, 6 Wall. 35 (1868) 8, 11
Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917) 9, 31
Crutcher v. Kentucky, 141 U. S. 47 (1891) 9, 11
Cudahy Packing Co. v. Minnesota, 246 U. S. 450 (1918) 11

Educational Films v. Ward, 282 U. S. 379 (1931) 25
Eureka Pipe Line Co. v. Hallanan, 257 U. S. 265 (1921) 9, 11, 26

Fargo v. Michigan, 121 U. S. 230 (1887) 9
Federal Compress & W. Co. v. McLean, 291 U. S. 17 (1934) 11
Ficklen v. Shelby Taxing Dist., 145 U. S. 1 (1892) 25
Fisher's Blend Station v. Tax Commission, 297 U. S. 650 (1936) 9, 11, 12, 18, 22
Foster v. Davenport, 22 How. 244 (1859) 8

Galveston H. & S. A. R. Co. v. Texas, 210 U. S. 217 (1908) 9, 12, 17
Gibbons v. Ogden, 9 Wheat. 1 (1824) 12, 28
Gwin, White & Prince v. Henneford, 305 U. S. 434 (1939) 20, 22, 23, 27

PAGE

Henderson Bridge Co. v. Kentucky, 166 U. S. 148 (1897) 11
Henneford v. Silas Mason, 300 U. S. 577 (1937) 10
Heyman v. Hays, 236 U. S. 178 (1915) 9

James v. Dravo Contracting Co., 302 U. S. 134 (1937) 6

Leathers v. Blessing, 105 U. S. 626 (1882) 33
Leloup v. Mobile, 127 U. S. 640 (1888) 9, 11, 16

Main, The, 51 Fed. 954 (C. C. A. 5th) (1892) 31
Maine v. Grand Trunk R. Co., 142 U. S. 217 (1891) .. 11, 17
Meyer v. Wells Fargo, 223 U. S. 298 (1912) 12
Minnesota v. Blasius, 290 U. S. 1 (1933) 10
Moran v. New Orleans, 112 U. S. 69 (1884) 8

McCall v. California, 136 U. S. 104 (1890) 9
McGoldrick v. Berwind-White Coal Co., 309 U. S. 33 (1940) 10, 20, 23, 26, 27
McGoldrick v. Gulf Oil Corp., 309 U. S. 414 (1940) ... 33
McLeod v. Dilworth, 322 U. S. 327 (1944) 23

Nashville C. & St. L. Ry. v. Wallace, 288 U. S. 249 (1933) 10
New Jersey Bell Tel. v. State Board, 280 U. S. 338 (1930) 9
New York, L. E. & W. R. Co. v. Pennsylvania, 158 U. S. 431 (1895) 11

Ozark Pipe Line v. Monier, 266 U. S. 555 (1925) 9, 12

Philadelphia & Reading R. Co. v. Pennsylvania (State Tax on Railway Gross Receipts), 82 U. S. 284 (1873) 24
Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887) 9, 12, 15, 17
Postal Teleg. Cable Co. v. Adams, 155 U. S. 688 (1895) 11
Postal Teleg-Cable Co. v. Richmond, 249 U. S. 252 (1919) 25

PAGE

Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90 ..... 2, 7, 8, 9, 1[illegible] 9, 22, 30
Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18 (1891) 11

Quaker City Cab Co. v. Pennsylvania, 277 U. S. 389 (1928) 30

Ratterman v. Western Union, 127 U. S. 411 (1888) 9, 12

Sonneborn v. Cureton, 262 U. S. 506 (1923) 10, 33
Southern Pacific v. Gallagher, 306 U. S. 167 (1939) 10, 23
Southern Steamship Company v. National Labor Relations Board, 316 U. S. 31 (1942) 34
Sprout v. South Bend, 277 U. S. 163 (1928) 9, 11

The Case of The State Freight Tax, 15 Wall. 232 (1873) 9, 11, 14, 26
The Daniel Ball, 10 Wall. 557 (1871) 8
Texas Transport & T. Co. v. New Orleans, 264 U. S. 150 (1924) 9, 12, 23

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 (1920) 11
United States Glue v. Oak Creek, 247 U. S. 321 (1918) 11, 18

Ware & Leland v. Mobile, 209 U. S. 405 (1908) 19
Western Live Stock v. Bureau of Revenue, 303 U. S. 250 (1938) 19, 20, 21, 23
Williams v. Fears, 179 U. S. 270 (1900) 19
Wisconsin & M. R. Co. v. Powers, 191 U. S. 379 (1903) 11
Woodruff v. Parham, 8 Wall. 123 (1869) 10, 33

Statutes Cited.

PAGE

New York City Laws:

Local Law No. 26 of 1938 1
Local Law No. 103 of 1939 1
Local Law No. 78 of 1940 1
Local Law No. 47 of 1941 1

New York City Administrative Code:

Chap. 17, Title C 24
Chap. 41, Titles N and M 24

New York Laws:

Laws of 1934, ch. 873 5

New York Tax Law:

Art. I, Sec. 4, Par. 11 ..... 29, 30

United States Constitution:

Art. I, Sec. 8, Cl. 3 7
Art. I, Sec. 10, Cl. 2 ..... 31, 33

United States Code Annotated:

Title 46, Sec. 85, *et seq.* 34

Other Authorities Cited.

Frankfurter, The Commerce Clause Under Marshall, Taney & Waite 10

Lockhart, The Sales Tax on Interstate Commerce, 52 Harv. L. Rev. 617 (1939) 28

Supreme Court of the United States

OCTOBER TERM, 1945

No. 519

JOSEPH D. MCGOLDRICK, Comptroller of the City of New York, and ALMERINDO PORTFOLIO, Treasurer of the City of New York,

Petitioners,

against

JOHN T. CLARK & SON,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of New York

BRIEF FOR RESPONDENT

In this case the Court is called upon to consider the constitutionality of a tax laid by the City of New York on the gross receipts of a contracting stevedore engaged in loading and unloading cargoes moving exclusively in interstate and foreign commerce.

In purported compliance with Chapter 873 of the Laws of 1934 of the State of New York, the Council of the City of New York adopted the following Local Laws:

Local Law No. 20 of 1938, effective June 30, 1938;
Local Law No. 103 of 1939, effective June 28, 1939;
Local Law No. 78 of 1940, effective June 29, 1940;
Local Law No. 47 of 1941, effective June 30, 1941.

Each of said Local Laws imposed a tax, measured by gross receipts, for the privilege of carrying on or exercising for gain or profit within the City of New York any trade, business or commercial activity.

Under protest and to avoid the imposition of penalties, respondent paid to the Collector of the City of New York, pursuant to said Local Laws, a tax, measured by respondent's gross receipts, for the years 1938-1941, inclusive, amounting altogether to $4,942.37 (R. 64-70).

Thereafter, respondent filed applications for refund (R. 73-81), which, after administrative hearings, were denied (R. 5). Upon respondent's petition the determination of the Comptroller was reviewed and nullified by the Appellate Division of the Supreme Court of the State of New York; First Judicial Department, on the authority of *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90, and the Comptroller and Treasurer were ordered to refund the amount paid by the taxpayer, with interest (269 App. Div. 685). The Court of Appeals affirmed the order of the Appellate Division without opinion (294 N. Y. 908). In both courts the decisions were unanimous.

This Court granted certiorari on November 19, 1945.

Statement of the Case

Petitioners' brief does not state the facts as accurately or fully as we believe they should be stated.

Respondent is a New York corporation engaged in the business of general stevedoring in the Port of New York.

Respondent's only office is located in New York City (R. 49).

The general stevedoring business as carried on by respondent during the tax years in question within the territorial limits of the City of New York, consisted of the loading and unloading of steamships engaged, with one exception, exclusively in foreign commerce (R. 46, 47, 49, 51).

In the typical operation, loading a steamship, respondent received a list of cargo and had its plan clerk make up a plan for its stowage according to weight, type of cargo, destination, and other related matters (R. 21, 22, 61; Exhibit 12, R. 120-A, 120-B). This was usually done before the ship arrived (R. 22).

Upon the ship's arrival, respondent's men handled the lines in berthing her (R. 23), removed the hatches, rigged the cargo booms, discharged the ballast and did all else necessary to prepare the ship to receive cargo (R. 23).

Respondent's men then took possession of cargo, delivered to the pier by truckmen not in respondent's employ or received alongside the ship or pier in lighters not owned or operated by respondent (R. 23), and transferred it directly, and without any interruption, into the ship (R. 34, 35).

Loading and stowing completed, respondent's men unrigged the booms, secured the hatches, made everything shipshape, and finally cast off the lines to permit the ship to sail (R. 36).

In unloading a ship, the same routine, though, of course, in inverse order, was followed.

Some of the gear necessary to carry out the foregoing operations was furnished by the steamship company and some by respondent (R. 36, 37).

During the course of respondent's operations, respondent assumed responsibility for all damage to or loss of freight, injury to its own employees, and to third persons, and damage to the ship (Exhibits 8, 9 and 10; R. 85-98).

Labor was of two kinds.

First, there were men regularly carried on respondent's payroll, such as (1) a pier superintendent who was respondent's direct representative in charge of the whole operation and worked with the captain of the ship and the steamship company's pier superintendent, (2) a head foreman who directed the loading of the ship under the

supervision of respondent's pier superintendent, (3) an assistant foreman, (4) a hiring or shaping foreman who hired the men in gangs as required, (5) hatch or gang foremen who took charge of the gangs, (6) repairmen (R. 37-43).

Second, there were the longshoremen themselves, men who followed the various piers, assembled when work was to be done, and were hired by the hiring or shaping foreman (R. 37). They worked in gangs of twenty to thirty-five (R. 39) and their working conditions and rate of pay were regulated by agreement between the New York Shipping Association, of which respondent was a member (R. 45), and the International Longshoremen's Association (R. 45; Exhibit 11, R. 99-119).

Longshoremen working in the Port of Greater New York and vicinity were subject to two distinct wage scales: one for coastwise shipping (from the Port of New York to another port within the United States or vice versa) and one for deep sea shipping (from the Port of New York to a foreign port or vice versa). The deep sea rate was higher than the coastwise rate. All wages paid by respondent were paid at the deep sea rate (R. 46, 47).

All cargo loaded or unloaded by respondent in New York City was en route to or from a foreign port, that is, it was loaded into or discharged from ships engaged purely in foreign commerce, with the exception of one, the "Munargo," which touched at Miami, Florida (R. 46, 47, 49, 51).

Loading and unloading steamships and making incidental repairs to its own equipment constituted respondent's only activities (R. 50-51). It did not act as employment agency for steamship companies which attended to their own stevedoring (R. 58).

Respondent's services were rendered under contract to steamship companies such as Cunard White Star Ltd.,

Ellerman & Bucknall Steamship Company Limited, Munargo Line Company (Exhibits 8, 9 and 10, R. 85-98) and were paid for at specified rates per ton of cargo except that certain work was done on a "cost plus" basis. (See schedules R. 85, 91, 92, 95 and 96.)

In describing respondent's activities, we have been speaking of operations carried on within the territorial limits of the City of New York. Respondent also performed similar services at piers located in Hoboken, New Jersey and elsewhere outside of the City of New York during the tax years in question, the receipts from which were similarly taxed by petitioners.

As applied to its gross receipts from the operations described above, and it engaged in no others, respondent took the position (a) that in loading and unloading vessels engaged in commerce between the United States and foreign countries, it was itself engaged in foreign commerce and that the City of New York had no power to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts; (b) that the City of New York had no power to tax that part of respondent's gross receipts which were received as compensation for services rendered in New Jersey; (c) that the City of New York had no power to tax that part of respondent's gross receipts which were received for the performance of acts on vessels and/or structures not subject to the jurisdiction of the State of New York or the City of New York; (d) that the Local Laws did not authorize the imposition of the tax in question on respondent's gross receipts, or (e) if they did, they violated the Commerce Clause, the Fourteenth Amendment, the Constitution of the State of New York and the Enabling Act (New York Laws of 1934, Chap. 873); (f) that, if the Enabling Act purported to grant authority to the City of New York to levy the tax in question on respondent's

gross receipts, it, too, violated the Commerce Clause, the Fourteenth Amendment and the Constitution of the State of New York (R. 74-84).

POINT I.

The imposition of the tax on respondent's New Jersey receipts is not only unauthorized by the Enabling Act but is in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

The Enabling Act provides that:

> "This act shall not authorize the imposition of a tax on any transaction originating and/or consummated outside of the territorial limits of any such city, notwithstanding that some act be necessarily performed with respect to such transaction within such limits."

Included in respondent's gross receipts upon which the tax was paid were substantial amounts received by respondent from stevedoring operations carried on within the territorial limits of the State of New Jersey. Such amounts were clearly exempt from tax under the provisions of the Enabling Act.

Even without the quoted exemption, the State of New York could not have delegated to the City of New York authority to lay a tax upon respondent with respect to work done in the State of New Jersey.

James v. *Dravo Contracting Co.*, 302 U. S. 134, 139 (1937).

In their brief (p. 3) petitioners say that they "did not in the New York State courts and do not here press the

issue of the taxability of the receipts for New Jersey services", but neither do they expressly abandon the issue or refund the tax, and the fact is that, in their brief in the Appellate Division, they said, "we believe that the tax is applicable to the New Jersey receipts." So far as respondent is concerned, the issue is still a live one: Respondent still desires a refund of the tax on its New Jersey receipts and takes no comfort from petitioners' statement that they do not press the issue. The fortuitous circumstance that only about one tenth of respondent's services was rendered in New Jersey does not render the issue unimportant.

POINT II.

The imposition of the tax violates Article I, Section 8, Clause 3 of the Constitution of the United States.

Article I, Section 8, Clause 3 of the Constitution of the United States, provides that:

> "The Congress shall have Power * * * To regulate Commerce with foreign Nations and among the several States * * *"

In *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), Mr. Justice CARDOZO, writing for an unanimous Court, said, at page 92:

> "The business of appellant, in so far as it consists of the loading and discharge of cargoes by longshoremen subject to its own direction and control, is interstate or foreign commerce.
>
> "Transportation of a cargo by water is impossible or futile unless the thing to be transported is put aboard the ship and taken off at destination. A stevedore who in person or by servants does work

> so indispensable is as much an agency of commerce as shipowner or master. 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." ' "

What Mr. Justice CARDOZO said of the operations of the Puget Sound Stevedoring Company is equally true of respondent's operations in the case at bar and is not denied by petitioners. We therefore start with the undisputed premise that the challenged tax was laid upon gross receipts derived from the transportation of goods in interstate and foreign commerce.

That respondent's operations were conducted entirely within the State of New York* does not affect their interstate or foreign character.

> *Foster* v. *Davenport*, 22 How. 244 (1859);
> *The Daniel Ball*, 10 Wall. 557 (1871);
> *Moran* v. *New Orleans*, 112 U. S. 69 (1884);
> *Puget Sound Stevedoring Co.* v. *Tax Commission, supra* (1937).

State taxes levied directly upon gross receipts from the transportation of goods, persons or messages in interstate and foreign commerce or levied directly on the goods while in transit or exacted as a fee for the privilege of engaging in such traffic have long been held repugnant to the Commerce Clause.

> *Almy* v. *California*, 24 How. 169 (1861);
> *Crandall* v. *Nevada*, 6 Wall. 35 (1868);

* We shall ignore, for the sake of simplifying the argument, that part of respondent's activities which took place in New Jersey.

The Case of The State Freight Tax, 15 Wall. 232 (1873);
Fargo v. *Michigan*, 121 U. S. 230 (1887);
Philadelphia & S. Mail S. S. Co. v. *Pennsylvania*, 122 U. S. 326 (1887);
Ratterman v. *Western Union*, 127 U. S. 411 (1888);
Leloup v. *Mobile*, 127 U. S. 640 (1888);
McCall v. *California*, 136 U. S. 104 (1890);
Crutcher v. *Kentucky*, 141 U. S. 47 (1891);
Galveston H. & S. A. R. Co. v. *Texas*, 210 U. S. 217 (1908);
Heyman v. *Hays*, 236 U. S. 178 (1915);
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292 (1917);
Eureka Pipe Line Co. v. *Hallanan*, 257 U. S. 265 (1921);
Champlain v. *Brattleboro*, 260 U. S. 366 (1922);
Texas Transport & T. Co. v. *New Orleans*, 264 U. S. 150 (1924);
Ozark Pipe Line v. *Monier*, 266 U. S. 555 (1925);
Sprout v. *South Bend*, 277 U. S. 163 (1928);
Carson Petroleum v. *Vial*, 279 U. S. 95 (1929);
New Jersey Bell Tel. v. *State Board*, 280 U. S. 338 (1930);
Cooney v. *Mountain States Tel. & Tel. Co.*, 294 U. S. 384 (1935);
Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650 (1936);
Puget Sound Stevedoring Co. v. *Tax Commission*, 362 U. S. 90 (1937).

We doubt that any principle of constitutional law is better settled or supported by a greater number of precedents than the rule that States cannot levy direct taxes on interstate and foreign transportation.

> "The history of the commerce clause, from the pioneer efforts of Marshall to our own day, is the history of imposing artificial patterns upon the play of economic life whereby an accommodation is achieved between the interacting concerns of states and nation." (Frankfurter, "The Commerce Clause Under Marshall, Taney & Waite", page 21, The University of North Carolina Press, 1937.)

In achieving this accommodation, so that interstate and foreign commerce can be required to pay its way and meet its fair share of the burden of local government, while still remaining unfettered by state regulation, this Court has sustained state taxes levied on personal property immediately before (*Coe* v. *Errol*, 116 U. S. 517 [1886]), and immediately after (*Woodruff* v. *Parham*, 8 Wall. 123 [1869]; *Sonneborn* v. *Cureton*, 262 U. S. 506 [1923]) its shipment in interstate commerce or during an interval while withdrawn from transportation (*Minnesota* v. *Blasius*, 290 U. S. 1 [1933]), but never while actually in transit (*Champlain* v. *Brattleboro*, 260 U. S. 366 [1922]; *Carson Petroleum* v. *Vial*, 279 U. S. 95 [1929]). It has sustained state taxes on the storage, withdrawal or use of personal property directly after it has completed its interstate journey (*Hemmeford* v. *Silas Mason*, 300 U. S. 577 [1937]), even though it was to be employed as an instrumentality of interstate commerce (*Southern Pacific* v. *Gallagher*, 306 U. S. 167 [1939]); *Nashville C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249 [1933]); on the delivery of possession of personal property at the conclusion of an interstate journey (*McGoldrick* v.

Berwind-White Coal Co., 309 U. S. 33 [1940]); and on the privilege of processing personal property temporarily withdrawn from transit (*Federal Compress & W. Co.* v. *McLean*, 291 U. S. 17 [1934]); but it has never sustained a state tax levied at a fixed sum per ton or per barrel for the privilege of transporting such property in interstate commerce (*The Case of The State Freight Tax*, 15 Wall. 232 [1873]; *Eureka Oil Pipe Line* v. *Hallanan*, 257 U. S. 265 [1921]); nor has it ever sustained a license tax levied at a flat rate for the privilege of engaging in the transportation of property (*Crutcher* v. *Kentucky*, 141 U. S. 47 [1891]) or persons (*Crandall* v. *Nevada*, 6 Wall. 35 [1868]; *Sprout* v. *South Bend*, 277 U. S. 163 [1928]) or messages (*Leloup* v. *Mobile*, 127 U. S. 640 [1888]) or broadcasts (*Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]) in interstate commerce. It has sustained state taxes on net income from interstate commerce when derived from interstate sales (*United States Glue* v. *Oak Creek*, 247 U. S. 321 [1918]) or from interstate activities when apportioned to the taxing state (*Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113 [1920]). It has sustained state franchise taxes and taxes in lieu of *ad valorem* taxes on real and personal property (*Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 [1891]; *Wisconsin & M. R. Co.* v. *Powers*, 191 U. S. 379 [1903]; *Postal Teleg. Cable Co.* v. *Adams*, 155 U. S. 688 [1895]; *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18 [1891]; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450 [1918]) even when employed directly in interstate commerce and when measured by gross receipts derived from that commerce; and it has sustained state franchise taxes measured by gross receipts where, though the taxpayer was not engaged in interstate commerce, the gross receipts were derived solely from the rental of bridges (*Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 148 [1897]) or railroad trackage (*New York, L. E. &*

W. R. Co. v. *Pennsylvania*, 158 U. S. 431 [1895]) used by common carriers engaged in interstate commerce; but it has never sustained a state tax levied directly on gross receipts derived from interstate transportation or communication (*Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania*, 122 U. S. 326 [1887], *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217 [1908]), even when properly apportioned to the intrastate phase of the business (*Meyer* v. *Wells Fargo*, 223 U. S. 298 [1912]; *Ratterman* v. *Western Union*, 127 U. S. 411 [1888]) or where, because the operations from which the receipts were derived took place wholly within the taxing state, there was no problem of apportionment (*Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150 [1924]; *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650 [1936]; *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 [1937]), (cf. *Ozark Pipe Line Co.* v. *Monier*, 266 U. S. 555 [1925]).

The reason why this Court has consistently denied to the States the right to levy direct taxes on the interstate transportation of goods, communications and persons is well known. In his argument in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), as summarized in the report, Daniel Webster said at page 11 that:

> "Few things were better known than the immediate causes which led to the adoption of the present constitution; and he thought nothing clearer than that the prevailing motive was to regulate commerce; to rescue it from the embarrassing and destructive consequences resulting from the legislation of so many different states, and to place it under the protection of a uniform law. * * *"

And at page 12,

> "* * * The entire purpose for which the delegates assembled at Annapolis, was to devise means

for the uniform regulation of trade. They found no means but in a general government; and they recommended a convention to accomplish that purpose. Over whatever other interests of the country this government may diffuse its benefits and its blessings, it will always be true, as matter of historical fact, that it had its immediate origin in the necessities of commerce; and, for its immediate object, the relief of those necessities, by removing their causes, and by establishing a uniform and steady system. * * *"

While Chief Justice MARSHALL was not prepared to follow Mr. Webster's argument to the limit, this Court, in striking down state taxes on interstate transportation and related activities, has spoken again and again of the commercial chaos which it was the object of the Constitution and particularly of the Commerce Clause to remedy, and has been emphatic in denying to the states the right to encroach upon the power of Congress to regulate the national aspects of interstate commerce or to impede its free flow.

In *Brown* v. *Maryland*, 12 Wheat. 419 (1827), Chief Justice MARSHALL said, at page 446:

"* * * It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system, than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy, would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity."

In *Cooley* v. *Board of Wardens*, 12 How. 299 (1851), Mr. Justice CURTIS said, at page 319:

> "* * * Now, the power to regulate commerce, embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question [local pilotage], as imperatively demanding that diversity, which alone can meet the local necessities of navigation. * * *"
>
> * * * * * * * * *
>
> "* * * Whatever subjects of this power are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress. * * *"

In *The Case of The State Freight Tax*, 15 Wall. 232 (1873), Mr. Justice STRONG said:

> "Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation and, therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The Legislature of Pennsylvania has, in effect, declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be

rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of $5. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another, without being obstructed by the intervention of state lines. * * * Nor can it make any difference that the legislative purpose was to raise money for the support of the state government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate trade * * *" (pp. 275, 276).

* * * * * * * * *

"It is of national importance that over that subject [transportation of passengers or merchandise through a State, or from one State to another] there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among other States was conferred upon the Federal Government" (pp. 279, 280).

In Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326 (1887), Mr. Justice BRADLEY said:

"* * * The tax was levied directly upon the receipts derived by the Company from its fares and

freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly, this could not be done by the State without interfering with the power of Congress" (p. 335).

* * * * * * * *

"It is hardly within the scope of the present discussion to refer to the disastrous effects to which the power to tax interstate or foreign commerce may lead. If the power exists in the State at all, it has no limit but the discretion of the State, and might be exercised in such a manner as to drive away that commerce, or to load it with an intolerable burden, seriously affecting the business and prosperity of other States interested in it; and if those States, by way of retaliation, or otherwise, should impose like restrictions, the utmost confusion would prevail in our commercial affairs" (p. 346).

In *Leloup* v. *Port of Mobile*, 127 U. S. 640 (1888), Mr. Justice BRADLEY said, at page 648:

"* * * no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such

taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. * * *"

In *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217 (1891), in which the majority was careful to point out that it did not question the correctness of the decision in *Philadelphia & S. Mail S. S. Co.* v. *Pennsylvania, supra,* but in which the minority saw an impairment of the rule there enunciated, Mr. Justice BRADLEY, writing for himself and Justices HARLAN, LAMAR and BROWN, said at pages 233, 234:

"* * * The power to regulate commerce among the several states (except as to matters merely local) is just as exclusive a power in Congress as is the power to regulate commerce with foreign nations and with the Indian tribes. It is given in the same clause and couched in the same phraseology; but if it may be exercised by the states, it might as well be expunged from the Constitution. We think it a power not only granted to be exercised, but that it is of first importance, being one of the principal moving causes of the adoption of the Constitution. The disputes between the different states in reference to interstate facilities of intercourse, and the discriminations adopted to favor each their own maritime cities, produced a state of things almost intolerable to be borne. * * *"

Often quoted is the reason given by Mr. Justice HOLMES in *Galveston, H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227 (1908), for drawing the distinction between a direct tax upon gross receipts and a tax on property measured by gross receipts.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property of a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. [*Postal Teleg.*

> *Cable Co.* v. *Adams*] * * * The question is whether this is such a tax. * * * The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. * * * If it [the state tax] bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

In *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328 (1918), where this Court sustained a state tax on net income derived in part from interstate sales, Mr. Justice PITNEY stressed the distinction between a net income tax and a gross receipts tax as follows:

> "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large."

In *Fisher's Blend Station* v. *Tax Commission*, 297 U. S. 650, 655, Mr. Justice STONE said:

> "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce."

In view of the foregoing authorities, it is not surprising that in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), this Court decided unanimously that, in loading and unloading vessels plying in interstate and foreign commerce, the Puget Sound Stevedoring Company was itself engaged in interstate and foreign commerce but that in acting as employment agent for the purpose of making longshoremen available to steamship companies, it was engaged in a local enterprise separate and distinct from interstate commerce (*Williams* v. *Fears*, 179 U. S. 270 [1900], *Ware & Leland* v. *Mobile*, 209 U. S. 405 [1908]), and that, consequently, the gross receipts from the first form of activity were exempt from state taxation while those derived from the second were not.

It follows that, unless the *Puget Sound* case and the long line of cases which preceded it have been overruled, respondent's gross receipts were not taxable by the City of New York in the case at bar.

Petitioners contend that the decision of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), handed down less than four months after the decision in the *Puget Sound* case, in effect overruled the latter; that Mr. Justice CARDOZO's opinion, written for an unanimous Court only a few months earlier, should from that time forth have been regarded merely as the final expression of dead dogma; and that the New York Court of Appeals should not have followed the decision of this Court when presented with a case which, on its facts, could not be distinguished from the *Puget Sound* case.

Petitioners contend that the case at bar is controlled by

the holdings of this Court in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938), *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939) and *McGoldrick* v. *Berwind-White Coal Co.*, 309 U. S. 33 (1940).

In *Western Live Stock* v. *Bureau of Revenue*, *supra*, this Court sustained a tax levied by the State of New Mexico for the privilege of engaging in the publication of newspapers and magazines, measured by gross receipts from the sale of advertising. The unsuccessful taxpayers claimed exemption from the tax because some of their advertising space was sold to non-residents of New Mexico and because their magazine enjoyed an interstate circulation.

Since the preparation and publication of the magazine was a purely local enterprise, quite separate and distinct from interstate commerce and the measure of the tax was fair, this Court sustained it.

In *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), a similar tax had been sustained over the objection that it was repugnant to the Commerce Clause. The *American Mfg.* case was directly in point and this Court found it controlling.

Western Live Stock v. *Bureau of Revenue* did not involve a state tax on gross receipts from interstate transportation and, in writing the opinion for the majority, the present Chief Justice was careful to point out that fact:

> "As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. Cf. Puget Sound Stevedoring Co. v. Tax Commission, 302 U. S. 90; *ante*, 68, 58 S. Ct. 72 * * *" (p. 258).

"Here it is perhaps enough that the privilege taxed is of a type which has been regarded as so separate and distinct from interstate transportation as to admit of different treatment for purposes of taxation" (p. 259).

"* * * On the other hand, * * * local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed [citing cases] or added to [citing cases] with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce [citing cases]. * * * The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove * * *" (p. 255).

Too much, in our opinion, has been read into the dicta thus pronounced. Petitioners draw from it a license to tax interstate commerce as freely as any other form of activity that takes place within their reach, provided that no other taxing authority can also reach the same activity. All the Court said, however, was that, if two states could tax the same activities simply because interstate commerce was being carried on, interstate commerce would be placed at a disadvantage as compared with intrastate commerce and any tax that exposed it to such a risk should be, and had always been, held repugnant to the Commerce Clause. It did not go on to say that, if a state avoided that one vice, it could tax, and hence regulate, interstate commerce as it pleased.

For the foregoing reasons, *Western Live Stock* v.

Bureau of Revenue, supra, is not in point, did not overrule *Puget Sound Stevedoring Co.* v. *Tax Commission, supra,* and is not, as petitioners contend, controlling in the case at bar.

In *Adam's Mfg. Co* v. *Storen,* 304 U. S. 307 (1938) the next case on which petitioners rely, this Court struck down an Indiana gross income tax as applied to income received by an Indiana manufacturer from interstate sales because there was the possibility that the same receipts might be taxed in the purchasers' states and thus place the interstate commerce at a disadvantage as compared with intrastate commerce.

Mr. Justice REED, writing for the majority said nothing which could be construed as overruling or discrediting the decision in the *Puget Sound* case. In fact, he cited it and *Fishers' Blend Station* v. *Tax Commission, supra,* in a footnote as illustrating the type of tax which had been repeatedly condemned as "a regulation of, and a burden upon, interstate commerce prohibited by" the Commerce Clause (p. 311). Mr. Justice BLACK, dissenting, stressed the fact that the tax in question was one which the state had levied on the taxpayer's sales, not, as in the case at bar, on the taxpayer's gross receipts from interstate transportation, which was quite a different matter.

For the foregoing reasons, *Adams Mfg. Co.* v. *Storen, supra,* is not in point and did not purport to overrule the *Puget Sound* case.

In *Gwin, White and Prince* v. *Henneford,* 305 U. S. 434 (1939), the next case on which petitioners rely, this Court struck down, for at least the third time, the same Washington gross receipts tax which it had invalidated in the *Fishers' Blend* and *Puget Sound* cases, this time as applied to the gross receipts of a fruit growers' marketing agent whose operations were carried on across state and national boundaries.

This was a transportation case, not in a primary sense, as in the case at bar, but in a secondary sense, as in *Texas Transportation Co.* v. *New Orleans*, 264 U. S. 150 (1924), and the Court struck down the tax for the same reason that it invalidated the tax in *Adams* v. *Storen, supra*. Mr. Justice BLACK, in a dissenting opinion restated, with emphasis upon the necessity for non-discrimination, the "reserved" or "concurrent powers" doctrine for which Chief Justice TANEY is remembered but, unless this Court is now prepared to adopt the views expressed in the dissenting opinions in this and the *Adams Mfg. Co.* case, we do not believe that *Gwin, White and Prince* v. *Henneford* adds anything to what was decided in *Western Live Stock* v. *Bureau of Revenue, supra*.

In *McGoldrick* v. *Berwind White Coal Co.*, 309 U. S. 33 (1940), the final case on which petitioners principally rely, this Court sustained the New York City sales tax as applied to interstate sales contracted and, (after interstate transportation), consummated in New York City. Whether the decision be justified on the theory of a "taxable moment", or because it was the equivalent of a use tax as in *Southern Pacific* v. *Gallagher*, 306 U. S. 167 (1939) (see the dissent of Mr. Justice DOUGLAS in *McLeod* v. *Dilworth*, 322 U. S. 327 [1944]), there is nothing in the decision which is decisive of the case at bar and nothing in the opinion written by the present Chief Justice which adds to what he had previously said in the *Western Live Stock*, and *Gwin, White & Prince* cases. He was careful to describe the tax as one which did not take place until after the termination of interstate transportation, and said at page 48: "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes * * * which are aimed at or discriminate against the

commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey." In this way, so it seems to us, he indicated as clearly as he could that, though the City of New York was at liberty to levy a sales tax after the transportation of goods in interstate commerce, it could not levy a tax, of the type now under consideration, on transportation itself.

Having shown that the cases upon which petitioners rely are not, as petitioners contend, decisive of the issue in the case at bar and that this Court has never sustained (except in the discredited case of *The State Tax on Railway Gross Receipts*, 82 U. S. 284 [1873]) a direct tax on gross receipts from interstate transportation, we turn to consider whether there is anything in the present case to lead this Court now to overrule the *Puget Sound* case and the long line of authorities upon which it rests and permit a direct tax on gross receipts from interstate transportation. We think there is not.

The gross receipts tax which petitioners levied in the case at bar lays a burden on interstate and foreign commerce in its simplest and most direct form.

The tax is laid directly on gross receipts from an activity which constitutes an indispensable link in the chain of commerce.

The tax is not levied in lieu of *ad valorem* property taxes. New York City levys the usual property taxes, in addition to retail sales and use taxes (Titles N & M of Chapter 41 of the New York City Administrative Code enacted pursuant to Chapter 873 of the laws of the State of New York, as amended) and a local occupancy tax on business property (Title C of Chapter 17 of the New York City Administrative Code enacted by Local Law 18, Laws

of 1938, pursuant to Chapter 823 of the Laws of the State of New York, as amended).

The tax is levied "for the privilege of carrying on for gain or profit within the city any trade or business", not for the purpose of police protection or to meet the cost of inspection of transportation or other facilities (*cf., Postal Teleg-Cable Co.* v. *Richmond*, 249 U. S. 252 [1919]), but "for the purpose of relieving the people of the City of New York from the hardships and suffering caused by unemployment" (a worthy purpose, no doubt, and reminiscent of the "Distressed and Decayed Pilots", their widows and children, in *Cooley* v. *Board of Wardens*, 12 How. 299 (1851), but hardly one which should be realized at the expense of national commerce).

The tax measured by respondent's gross receipts is not the only one which respondent must pay for the privilege of engaging in interstate and foreign commerce. Under Article 9-A of the New York State Tax Law, respondent is required to pay "for the privilege of exercising its franchises or doing business in this state in a corporate or organized capacity" a tax which, though said to be a franchise tax (*Bass, Ratcliff & Gretton, Ltd.* v. *State Tax Commission*, 266 U. S. 271 [1924]) is, in practical effect an income tax (*Educational Films* v. *Ward*, 282 U. S. 379 [1931]).

The tax cannot be sustained upon the theory that respondent expressly applied for the right to engage in or ever in fact engaged in intrastate or intracity business activities distinct from interstate commerce (*Ficke* v. *Shelby Taxing Dist.*, 145 U. S. 1 [1892]).

It is not even arguable that there is any interruption in the continuity of transit to justify the tax. The record shows that the object of employing contracting stevedores is to avoid delay in the transshipment of cargo. When

respondent takes control, the cargo is already in movement and never stops while respondent handles it (cf. *Carson Petroleum Co.* v. *Vial*, 279 U. S. 95 [1929]; *Eureka Pipe Line* v. *Hallanan*, 257 U. S. 265 [1921]).

The tax cannot be justified upon the theory that, because respondent's activities take place wholly within one taxing jurisdiction, they cannot be reached elsewhere. The cost of stevedoring is only one of the elements of the affreightment contracts under which goods are transported from one end of this country to the other. The decision of this Court in *McGoldrick* v. *Berwind-White Coal Co., supra*, where the cost of the entire transportation was one of the elements of the contract price, demonstrates how a second tax may be laid on these same gross receipts, and the dissenting opinion shows how these same gross receipts can be utilized over and over in the measurement of other taxes along the line of transportation.

Respondent receives and transships freight for an agreed rate per ton. Its gross receipts are derived from that and nothing else. Why should New York City be permitted to take a toll from every ton of freight received from or destined to the interior of this country or foreign nations so long as it continues to bear, as it does, its fair share of the burdens of local government through the payment of the other taxes to which we have referred? If New York City can levy such a tax, it can do so in any amount that may be deemed necessary to achieve the particular purpose in mind, and so can every other state and municipality along the line of the interstate journey. In this way, just because interstate commerce is being done, freight can be exposed and subjected to such a cumulative burden of taxation that it will be brought to a halt. Everything that was urged in condemnation of the tax in *The Case of The State Freight Tax, supra*, can be said in condemnation of this.

The fact that the tax is non-discriminatory is no sufficient safeguard. The Port of New York dominates the Eastern Seaboard and through it passes the bulk of all the commerce between the United States and Europe. The New York City waterfront is lined with piers at which the vessels engaged in that commerce are loaded and unloaded. Compared to the volume of goods flowing through the port in interstate and foreign commerce, the volume of goods flowing through the port in intrastate commerce is insignificant. What safeguard is it to interstate and foreign commerce that the loading and unloading of goods travelling in intrastate commerce, between New York City and Albany, for example, is subject to the same tax?

Petitioners now argue that they should be permitted to levy a direct tax upon gross receipts derived from the transportation of goods in interstate and foreign commerce, so long as the tax is non-discriminatory and is levied upon receipts from activities which take place wholly within their territorial jurisdiction. To support their contention they cannot point to a single case in which this Court has sustained a direct tax on gross receipts from interstate transportation. With the exception of *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434 (1939), they cannot even cite a transportation case and must place their entire reliance on dicta contained in sales tax and other non-transportation cases. They make no distinction between taxes on sales or for the privilege of engaging in local business distinct from interstate transportation and taxes on interstate transportation itself.

If state sales taxes on interstate sales are to be permitted, we recognize the good sense in sustaining them when imposed by the buyer's state (*McGoldrick* v. *Berwin-White Coal Co.*, 309 U. S. 33 [1940]) and striking them down when imposed by the seller's state (*Adams Mfg. Co.*

v. *Storen*, 304 U. S. 307 (1938)), for it is only in the buyer's state, where domestic and foreign goods come to market together, that the impact of a sales tax on interstate and intrastate commerce can be equalized (see Lockhart, "The Sales Tax in Interstate Commerce," 52 Harv. L. Rev. 617 (1939)), but the problem in the sales tax cases is so different from the problem in the transportation cases that we cannot accept petitioners' view that the latter should be cut to the same pattern as the former.

With the sales tax cases there is the possibility of two taxes on the same receipts, one by the seller's state and one by the buyer's state.

In the transportation cases there is the possibility of a multitude of taxes, depending upon the number of taxing districts through which the goods pass in the course of their movement. If the City of New York can levy a tax on the cost of moving goods from pier to ship, the City of Hoboken can levy a like tax on the cost of moving the goods from freight car to lighter to be brought across the Hudson River, the City of Chicago can levy a like tax on the cost of placing the goods on the freight cars for shipment, and each state and municipality along the route can levy its own tax upon the movement of the goods within its territorial jurisdiction, until, by the imposition of a myriad of taxes, interstate commerce will be brought to a halt.

The fact that petitioners seek to reach only the activities which take place within the City of New York and that they do not discriminate in favor of local transportation is thus shown to be no justification for a direct tax on receipts from interstate transportation. In *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), the State of New York sought only to control navigation within its own waters and only to enforce a monopoly which applied equally to domestic and foreign steamboat operators, but the regulation

crippled interstate commerce and was struck down by this Court.

The fact that the tax is small in amount is also no justification for it, for the power to levy a small tax presupposes the power to levy a large tax and, for this Court to sustain the power of the City of New York to levy such a tax would be to invite each state, city and taxing district to levy its own tax, each in an amount, large or small, thought by it to be appropriate.

What petitioners seek, in effect, is the power to directly tax and hence to regulate or even to prohibit interstate commerce within the territorial jurisdiction of the City of New York. The exercise of such power locally caused the stagnation of interstate commerce under the Confederation and it was to take such a dangerous power away from the states and place such commerce under national control that the Commerce Clause was enacted. The necessity for the continued protection of interstate transportation from the exercise of so dangerous a power is incomparably greater today than ever before, for our dependence upon the free flow of goods in commerce has immeasurably increased. It would be a calamity, if interstate transportation were again to be subjected to direct local taxation."

POINT III.

The imposition of the tax is in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

Under the provisions of Article I, Section 4, Paragraph 11 of the New York Tax Law, the City of New York would clearly be without power to levy a tax on gross receipts of steamship companies doing their own stevedoring. The statute referred to states that:

> "All corporations incorporated under the laws of the state of New York, engaged in ocean commerce between any port in the United States and any foreign port, all of whose vessels are employed between foreign ports and ports in the United States, are exempted from all taxation in this state, for state and local purposes, upon their capital stock, franchises and earnings, for the period beginning January first, nineteen hundred thirty-three and ending December thirty-first, nineteen hundred and fifty-two."

To levy an excise tax on respondent's gross receipts for the privilege of engaging in business indispensable to waterborne commerce, and any serious interruption of which cripples at once the activities of a port, without levying a similar tax on steamship companies for the privilege of engaging in the same activities denies to respondent the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

As stated by this Court in the *Puget Sound* case, "What is decisive is the nature of the act, not the person of the actor." The act being the same, the authority to levy the tax must likewise be the same. In *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389 (1928) it was held that the imposition of a tax on the gross receipts of corporations operating taxicabs, when such tax was not imposed upon individuals and partnerships engaged in the same business, unconstitutionally deprived the corporations of the equal protection of the laws where other taxes were laid upon both classes of taxpayers alike.

POINT IV.

The imposition of the tax violates Article I, Section 10, Clause 2 of the Constitution of the United States.

Article I, Section 10, Clause 2 of the Constitution of the United States provides that:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

All of the vessels loaded and unloaded by respondent were engaged in foreign commerce.

The imposition of a tax on respondent's gross receipts necessarily increases the cost of the services performed by respondent and correspondingly increases the cost of importing and exporting goods and constitutes a levy of duties on imports and exports contrary to said provisions of the Constitution. As stated in *The Main*, 51 Fed. 954, 957 (C. C. A. 5th) (1892):

> "* * * A vessel, in taking on and unloading cargo, is earning freight; for, in loading and unloading, services are rendered, the expense of which necessarily enters into the affreightment contract. * * *"

That a tax which has such effect is contrary to the provisions of the Constitution referred to appears from the opinion of this Court in *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295 (1917) wherein it was stated:

"The bare question, then, is whether a state tax imposed upon the business of selling goods in foreign commerce, in so far as it is measured by the gross receipts from merchandise shipped to foreign countries, is in effect a regulation of foreign commerce or an impost upon exports, within the meaning of the pertinent clauses of the Federal Constitution. Although dual in form, the question may be treated as a single one, since it is obvious that, for the purposes of this case, an impost upon exports and a regulation of foreign commerce may be regarded as interchangeable terms. And there is no suggestion that the tax is limited to the necessities of inspection, or that the consent of Congress has been given.

"We are constrained to hold that the answer must be in the affirmative. No question is made as to the validity of the small fixed tax of $3 imposed upon wholesale venders doing business within the state in both internal and foreign commerce; but the additional imposition of a percentage upon each dollar of the gross transactions in foreign commerce seems to us to be by its necessary effect, a tax upon such commerce, and therefore a regulation of it; and for the same reason, to be in effect an impost or duty upon exports. * * *"

Notwithstanding that the impact of a state tax on interstate commerce is much the same as it would be on foreign commerce and that, as Mr. Justice PITNEY pointed out in the *Crew Levick* case, *supra*, the imposition of a tax on gross receipts regulates and burdens the one no less than the other and notwithstanding also that in *Brown* v. *Maryland*, 12 Wheat. 419 (1827) Chief Justice MARSHALL could perceive no difference between state regulation of imports from foreign countries as compared with imports from sister states, this Court has distinguished the two in its rulings on the subject now under consideration and has sustained state taxes as applied to interstate commerce

which it has condemned as applied to foreign commerce. (Compare *Brown* v. *Maryland, supra,* with *Woodruff* v. *Parham,* 8 Wall. 123 (1869) and *Sonneborn* v. *Cureton,* 262 U. S. 506 (1923). The reasons adduced for the distinction are that foreign commerce is a matter which must necessarily be regulated by international treaties; that, accordingly, Congress alone has the power to regulate it; and that, in addition, Congress has affirmatively regulated it and the states cannot interfere with that regulation or place any extra burdens upon such commerce (*McGoldrick* v. *Gulf Oil Corp.,* 309 U. S. 414 [1940]).

We therefore cannot over-emphasize the fact that all of the vessels loaded or unloaded by respondent were engaged in foreign commerce; that respondent was paid for its services at an agreed rate per ton of freight; and that, consequently, the tax which petitioners levied on respondents gross receipts was "by its necessary effect * * * an impost or duty upon exports * * *" and imports in violation of Article I, Section 10, Clause 2 of the Constitution of the United States.

POINT V.

The imposition of the tax constitutes an unlawful interference with the paramount power of Congress over navigation upon the navigable waters of the nation.

A vessel in loading or unloading freight is still engaged in the business of navigation. See *Leathers* v. *Blessing,* 105 U. S. 626 (1882), wherein it was stated:

> "* * * The vessel was water-borne in the Mississippi River at the time, laden with an undischarged cargo, having just arrived with it from a voyage. The findings sufficiently show that her cargo

was to be discharged at the place where she was moored. Therefore, although the transit of the vessel was completed, she was still a vessel occupied in the business of navigation at the time. The facts, that she was securely moored to the wharf and that she had communication with the shore by a gangplank, did not make her a part of the land or deprive her of the character of a water-borne vessel."

This principle was recognized in *Southern Steamship Company* v. *National Labor Relations Board*, 316 U. S. 31 (1942), wherein this Court held that a vessel moored to a dock upon navigable waters of the United States is subject to the admiralty and maritime jurisdiction of the United States and that acts committed by seamen thereon may constitute mutiny.

That such vessel is regarded by Congress as still engaged in the business of navigation appears from various laws enacted by Congress. Thus, Congress has legislated concerning the time during which such a vessel may be loaded and unloaded (U. S. C. A. Title 46, Section 85, et seq.).

The fact that the stevedoring operations performed by respondent were performed upon vessels moored to docks within the territorial limits of the City of New York is immaterial. The operations performed were a part of the business of navigation and the City of New York could, therefore, levy no tax for the privilege of engaging therein.

CONCLUSION.

Respondent respectfully submits that the final order and judgment of the lower court directing the refund of the tax in question should be affirmed.

Respectfully submitted,

ROGER S. BALDWIN,
Counsel for Respondent.

SAMUEL M. LANE,
BLISS ANSNES,
of Counsel.

SUPREME COURT OF THE UNITED STATES

Nos. 29 AND 30.—OCTOBER TERM, 1946.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners, 29 v. Carter & Weekes Stevedoring Company. Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners, 30 v. John T. Clark & Son.	On Writs of Certiorari to the Supreme Court of the State of New York.

[March 10, 1947.]

MR. JUSTICE REED delivered the opinion of the Court.

These two writs of certiorari bring before this Court contentions in regard to the application to the respective respondents, Carter & Weekes Stevedoring Company and John T. Clark & Son, of New York City, of the general business tax laws covering, when both cases are considered, the years 1937 to 1941, inclusive.[1] The character of the taxes in issue will appear from a section, set out below,

[1] The taxes in question were levied by the City of New York by a series of local laws, No. 22 of 1937, No. 20 of 1938, No. 103 of 1939, No. 78 of 1940, No. 47 of 1941. The local laws were passed pursuant to authorization by the State of New York. See Laws of New York 1940, Ch. 245. There is no dispute as to the general validity of the local laws. See *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, and *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573. These cases involved other phases of these local laws.

Certiorari granted, 326 U. S. 713; argued March 1, 1946; restored to the docket for reargument April 22, 1946.

of a local law imposing the tax for 1939 and 1940.[2] The respective taxpayers are liable also for the general income and *ad valorem* taxes of the State and City of New York. Both respondents are corporations engaged in the business of general stevedoring. For these cases, the business of respondents may be considered as consisting only of taking freight from a convenient place on the pier or lighter wholly within the territorial limits of New York City and storing it properly for safety and for handling in or on the outgoing vessel alongside, or of similarly unloading a vessel on its arrival. The vessels moved in interstate or foreign commerce, without a call at any other port of New York. We do not find it necessary to consider separately interstate and foreign commerce. The Commerce Clause covers both.

Through statutory proceedings unnecessary to particularize, the Comptroller of the City of New York determined that the respondents were liable for percentage taxes upon the entire gross receipts from the above activities for the years in question under the provisions of the respective local laws to which reference has been made. Review of

---

[2] Local Laws of the City of New York (1940), No. 78:

"§ R41-2.0. Imposition of tax. a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales to persons within such city, for each of the periods of one year, or any part thereof, beginning on July first of the years nineteen hundred thirty-nine and nineteen hundred forty, every person shall pay an excise tax which shall be equal to one-tenth of one percentum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which such period shall commence, . . ."

No problem of allocation or apportionment is involved. See § 5. No question is raised by petitioner that any part of the tax is allocable to receipts properly attributable to doing business in New York City, if all of the receipts are not subject to the local act. § R41-3.0.

these determinations was had by respondents in the Supreme Court of New York County, Appellate Division. The determinations of the Comptroller were annulled on the authority of *Puget Sound Stevedoring Company* v. *Tax Commission*, 302 U. S. 90. 269 App. Div. 685. These orders were affirmed by the Court of Appeals, 294 N. Y. 906, 908, and remittiturs issued stating that the Court of Appeals affirmed on the ground that the local laws as applied in these cases were in violation of Article I, § 8, Clause 3, of the Constitution of the United States.[3] Writs of certiorari to this Court were sought and granted on the issue of whether or not this tax on these respondents constituted an unconstitutional burden on commerce.

Petitioners recognize the force of the *Puget Sound* case as a precedent. Their argument is that subsequent holdings of this Court have indicated that the reasons which underlay the decision are no longer controlling in judicial examination of the constitutionality of state taxation of the gross proceeds derived from commerce subject to federal regulation. They cite, among others, these later decisions: *Western Live Stock* v. *Bureau of Internal Revenue*, 303 U. S. 250; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33; *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, 313 U. S. 62.

In the *Puget Sound* case a state tax on gross receipts, indistinguishable from that laid by New York City in this case, was held invalid as applied to stevedoring activities exactly like those with which we are here concerned. The *Puget Sound* opinion pointed out, p. 92 *et seq.*, that transportation by water is impossible without loading and unloading. Those incidents to transportation occupy the same relation to that commerce whether performed by the

[3] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."

crew or by stevedore, contracting independently to handle the cargo. The movement of cargo off and on the ship is substantially a continuation of the transportation. Cf. *Baltimore & O. S. W. R. Co.* v. *Burtch*, 263 U. S. 540.

It is trite to repeat that the want of power in the confederation to regulate commerce was a principal reason for the adoption of the Constitution. The Commerce Clause bears no limitation of power upon its face and, when the Congress acts under it, interpretation has suggested none, except such as may be prescribed by the Constitution. *Gibbons* v. *Ogden*, 9 Wheat. 1, 196; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 147; *North American Co.* v. *S. E. C.*, 327 U. S. 686, 704. On the other hand, the Constitution, by words, places no limitation upon a state's power to tax the things or activities or persons within its boundaries. What limitations there are spring from applications to state tax situations of general clauses of the Constitution. *E. g.*, Art. I, § 10, Cl. 2 and 3; *New York Indians*, 5 Wall. 761; *Board of County Commissioners* v. *United States*, 308 U. S. 343; *Bell's Gap R. Co.* v. *Pennsylvania*, 134 U. S. 232, 237; *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 284; *Henderson Bridge Co.* v. *Henderson City*, 173 U. S. 592, 614–15; *New York Rapid Transit Corp.* v. *City of New York*, 303 U. S. 573, 581–82. From the Commerce Clause itself, there comes, also, an abridgment of the state's power to tax within its territorial limits. This has arisen from long continued judicial interpretation that, without congressional action, the words themselves of the Commerce Clause forbid undue interferences by the states with interstate commerce[4] and that this rule applies in full force to

[4] *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767–69, and cases cited; *Morgan* v. *Commonwealth of Virginia*, 328 U. S. 373, 379 and cases cited n. 17; *Freeman* v. *Hewit*, No. 3, October Term, 1946, decided December 16, 1946; *Richfield Oil Corp.* v. *State Board of Equalization*, No. 46, October Term, 1946, decided November 25, 1946, slip op. p. 5.

an unapportioned[5] tax on the gross proceeds from interstate business,[6] where the taxes were not in lieu of *ad valorem* taxes on property.[7]

We do not think that a tax on gross income from stevedoring, obviously a "continuation of the transportation," is a tax apportioned to income derived from activities within the taxing state. The transportation in commerce, at the least, begins with loading and ends with unloading. Loading and unloading has effect on transportation outside the taxing state because those activities are not only preliminary to but are an essential part of the safety and convenience of the transportation itself.

When we come to weigh the burden or interference of this tax on the gross receipts from interstate commerce, the purposes of that portion of the Commerce Clause—the freeing of business from unneighborly regulations that inhibit the intercourse which supplies reciprocal wants by commerce[8]—is a significant factor for consideration. An interpretation of the text to leave the states free to tax commerce until Congress intervened would have permitted intolerable discriminations. *Nippert* v. *City of Richmond*, 327 U. S. 416, and cases collected in notes

---

[5] Compare *Maine* v. *Grand Trunk R. Co.*, 142 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 301; *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113; *Hans Rees' Sons* v. *North Carolina*, 283 U. S. 123; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157.

[6] *Fargo* v. *Michigan*, 121 U. S. 230; *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S. 411, 428; *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; *Galveston, Harrisburg & San Antonio R. Co.* v. *Texas*, 210 U. S. 217; *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300; *Minnesota Rate Cases*, 230 U. S. 352, 400; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 295; *Fisher's Blend Station* v. *Tax Comm'n*, 297 U. S. 650, 655; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 312; *Freeman* v. *Hewit*, *supra*.

[7] *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 698; *United States Express Co.* v. *Minnesota*, 223 U. S. 335, 346–48.

[8] Federalist 7, 22, 42; *Baldwin* v. *G. A. F. Seelig*, 294 U. S. 511, 523.

13, 14, 15 and 16. Nevertheless, a proper regard for the authority of the states and their right to require interstate commerce to contribute by taxes to the support of the state governments which make their interstate commerce possible, has led Congress, over a long period to leave intact the judicial rulings, referred to above, that apportioned, non-discriminatory gross receipt taxes or those fairly levied in lieu of property taxes conformed to the requirements of the Commerce Clause. As the power lies in Congress under the Clause to make any desired adjustment in the taxation area, its acquiescence in our former rulings on state taxation indicates its agreement with the adjustments of the competing interests of commerce and necessary state revenues.[9] There is another reason that may be the basis for the acceptance, almost complete, by Congress of the judicial interpretations in this field. This is that a wide latitude exists for permissible state taxation. This term, in an effort to show that the reach of the Circuit Court did not destroy the state's power to make commerce pay its way, we elaborated the fact that taxes on the commerce itself was not the sole source of state revenue from that commerce. *Freeman* v. *Hewit*, *supra*, p. 5; see also *Adams Mfg. Co.* v. *Storen*, *supra*, 310.

A power in a state to tax interstate commerce or its gross proceeds, unhampered by the Commerce Clause, would permit a multiple burden upon that commerce. This has been noted as ground for their invalidation. *Western Live Stock* v. *Bureau*, 303 U. S. 250, 255. The selection of an intrastate incident as the taxable event actually

---

[9] See *Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 326; *United States* v. *Hill*, 248 U. S. 420; *Whitfield* v. *Ohio*, 297 U. S. 431; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334; *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 430; *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 769; *Freeman* v. *Hewit*, No. 3, October Term 1946, decided December 16, 1946, slip op. p. 4.

carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy.[10] This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. In the present case, the threat of a multiple burden, except in the few instances in the record of interstate, in distinction to foreign, commerce, is absent. The multiple burden on interstate transportation from taxation of the gross receipts from stevedoring arises from the possibility of a similar tax for unloading. The actual effect on the cost of carrying on the commerce does not differ from that imposed by any other tax exaction—*ad valorem*, net income or excise. Cf. *Western Live Stock* v. *Bureau*, *supra*, 254. We need consider only whether or not the loading and unloading is distinct enough from the commerce to permit the tax on the gross.

On precedent, the *Puget Sound* case is controlling. It was promptly and recently cited with approval.[11] It appears in *Adams Mfg. Co.* v. *Storen*[12] in support of the possible double tax argument against levies on interstate commerce. In *Western Live Stock* v. *Bureau*, *supra*, 258, it was adverted to as a case for comparison with a ruling that "preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce." The case was not included in the Court's opinion in *Gwin, White & Prince, Inc.* v. *Henneford*,[13] where a state gross

---

[10] *Western Live Stock* v. *Bureau*, *supra*, 258–260; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 176; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 48; *Dept. of Treasury* v. *Wood Co.*, 313 U. S. 62.

[11] *Coverdale* v. *Pipe Line Co.*, 303 U. S. 604, 609; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 178; *Freeman* v. *Hewit*, *supra*, p. 8.

[12] 304 U. S. 307, 312.

[13] 305 U. S. 434.

receipts tax on income from marketing fruit interstate was invalidated under the Commerce Clause, or in *McGoldrick* v. *Berwind-White Co.*,[14] though relied upon in the concurring opinion in the first at p. 442 and the dissent in the second at p. 62. Upon examination this history gives an impression that there has been a doubt as to the continued vitality of *Puget Sound*. We come now face to face with the problem of overruling or approving the case.

Since *Puget Sound* there has been full consideration of how far a state may go in taxing intrastate incidents closely related in time and movement to the interstate commerce. The cases that lend strongest support to petitioners' argument for overruling the *Puget Sound* decision have been referred to above. We comment further upon them. The 2% excise tax levied by New Mexico on the gross receipts of publishers from advertising, upheld in *Western Live Stock*, was found to be an exaction for carrying on a local business.[15] The *Gallagher* case turns expressly on our conclusion that a use tax is validly levied on an intrastate event, "separate and apart from interstate commerce," p. 176, and the *Wood Preserving* case [16] reached a similar result by reason of the fact that

[14] 309 U. S. 33.

[15] 303 U. S. at 257.

"All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere." P. 260. "So far as the advertising rates reflect a value attributable to the maintenance of a circulation of the magazine interstate, we think the burden on the interstate business is too remote and too attenuated to call for a rigidly logical application of the doctrine that gross receipts from interstate commerce may not be made the measure of a tax. . . . Practical rather than logical distinctions must be sought." P. 259.

The alternate ground, p. 260, that such a local tax cannot be taxed elsewhere is inapposite in such a foreign commerce situation as this.

[16] See *Harvester Co.* v. *Dept. of Treasury*, 322 U. S. 340, 348.

the taxpayer sold and delivered its ties intrastate before transportation began, 313 U. S. at 67. This is likewise true of *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, as explained in the *Storen case*.[17] When we examine the *Berwind-White* tax on the purchasers of tangible personal property for consumption, there is the same reliance upon the local character of the sale, pp. 43, 47, 49, 58.[18] We there said, p. 48:

---

[17] 304 U. S. at 312–13:

"The state court and the appellees rely strongly upon *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, as supporting the tax on appellant's total gross receipts derived from commerce with citizens of the State and those of other States or foreign countries. But that case dealt with a municipal license fee for pursuing the occupation of a manufacturer in St. Louis. The exaction was not an excise laid upon the taxpayer's sales or upon the income derived from sales. The tax on the privilege for the ensuing year was measured by a percentage of the past year's sales. The taxpayer had during the preceding year removed some of the goods manufactured to a warehouse in another State and, upon sale, delivered them from the warehouse. It contended that the city was without power to include these sales in the measure of the tax for the coming year. The court held, however, that the tax was upon the privilege of manufacturing within the State and it was permissible to measure the tax by the sales price of the goods produced rather than by their value at the date of manufacture. If the tax there under consideration had been a sales tax the city could not have measured it by sales consummated in another State."

Cf. *Freeman* v. *Hewit*, No. 3, October Term, 1946, slip op. p. 3.

[18] 309 U. S. at 49: "Its only relation to the commerce arises from the fact that immediately preceding transfer of possession to the purchaser within the state, which is the taxable event regardless of the time and place of passing title, the merchandise has been transported in interstate commerce and brought to its journey's end. Such a tax has no different effect upon interstate commerce than a tax on the use of property which has just been moved in interstate commerce, sustained in *Monamotor Oil Co.* v. *Johnson*, 292 U. S. 86; *Henneford* v. *Silas Mason Co.*, *supra*; *Felt & Tarrant Mfg. Co.* v. *Gallagher*, 306 U. S. 62; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, or the tax on storage or withdrawal for use by the consignee of gasoline,

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey."

Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions.

Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. See *Southern Pacific Co.* v. *Arizona*, 325 U. S. 761, 767. Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of *Puget Sound Stevedoring Company*. "What makes the tax invalid is the fact that there is interference

---

similarly sustained in *Gregg Dyeing Co.* v. *Query*, 286 U. S. 472; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249; *Edelman* v. *Boeing Air Transport*, 289 U. S. 249, or the familiar property tax on goods by the state of destination at the conclusion of their interstate journey. *Brown* v. *Houston*, *supra*; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500."

by a State with the freedom of interstate commerce." *Freeman* v. *Hewit*, *supra*, p. 7. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences. Not only does it follow a line of precedents outlawing taxes on the commerce itself but it has reason to support it in the likelihood that such legislation will flourish more luxuriantly where the most revenue will come from foreign or interstate commerce. Thus in port cities and transportation or handling centers, without discrimination against out-state as compared with local business, larger proportions of necessary revenue could be obtained from the flow of commerce. The avoidance of such a local toll on the passage of commerce through a locality was one of the reasons for the adoption of the Commerce Clause.

Affirmed.

MR. JUSTICE BLACK dissents.

SUPREME COURT OF THE UNITED STATES

Nos. 29 and 30.—October Term, 1946.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners,

29 v.

Carter & Weekes Stevedoring Company.

Lazarus Joseph, Comptroller of the City of New York, and Spencer C. Young, Treasurer of the City of New York, Petitioners,

30 v.

John T. Clark & Son.

On Writs of Certiorari to the Supreme Court of the State of New York.

[March 10, 1947.]

Mr. Justice Douglas, with whom Mr. Justice Rutledge concurs, dissenting in part.

First. I think the tax is valid insofar as it reaches the gross receipts from loading and unloading vessels engaged in interstate commerce.

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90, makes clear that respondents' activities in loading and unloading the vessels are interstate commerce. That case followed a long line of decisions[1] when it held in 1937 that a State could not tax the privilege of engaging in interstate or foreign commerce by exacting a percentage of the gross receipts.

[1] *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326; *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Tel. Co.* v. *Alabama*, 132 U. S. 472; *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *Meyer* v. *Wells Fargo & Co.*, 223 U. S. 298.

Those cases, like the present one, involved no exaction by the State of a license to engage in interstate commerce on the payment of flat license tax or otherwise. Cf. *Leloup* v. *Port of Mobile*, 127 U. S. 640; *Crutcher* v. *Kentucky*, 141 U. S. 47; *Bowman* v. *Continental Oil Co.*, 256 U. S. 642; *Cooney* v. *Mountain States Tel. Co.*, 294 U. S. 384; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 114. Nor did they, any more than the present case, concern legislation which expressed hostility to interstate commerce by discriminating against it. Cf. *Best & Co.* v. *Maxwell*, 311 U. S. 454; *Nippert* v. *City of Richmond*, 327 U. S. 416. Although all or like business of a local nature was subject to the same tax, the interstate business was granted immunity. The theory, as expressed in *Philadelphia & Southern S. Co.* v. *Pennsylvania*, 122 U. S. 326, 336, was that taxation was one form of regulation and a tax on the gross receipts from interstate transportation would be "a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the state without interfering with the power of Congress."

The tax in that case was a tax on the gross receipts from fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. As we shall see, the holding in the *Philadelphia & Southern S. Co.* case has not been impaired. But the principle it announced—that a tax on the gross receipts was forbidden because it was a regulation of interstate or foreign commerce—was not given full scope. For soon gross receipts taxes on businesses engaged in interstate commerce (including transportation or communication) were sustained where they were not discriminatory and where they were fairly apportioned to the commerce carried on in the taxing state.[2] *Maine* v. *Grand Trunk Ry.*

[2] In *Railroad Co.* v. *Maryland*, 21 Wall. 456, the payment of a percentage of gross receipts was upheld as a condition of the corporate franchise.

Co., 142 U. S. 217. Their validity was established whether they were employed as a measure of the value of a local franchise (*Maine* v. *Grand Trunk Ry. Co.*, *supra*; *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U. S. 379) or were used in lieu of all other property taxes to measure the value of the property in the State. *United States Express Co.* v. *Minnesota*, 223 U. S. 335; *Cudahy Packing Co.* v. *Minnesota*, 246 U. S. 450; *Illinois Central R. Co.* v. *Minnesota*, 309 U. S. 157.

The distinction between an apportioned gross receipts tax and a tax on all the gross receipts of an interstate business, such as was involved in *Philadelphia & Southern S. Co.* v. *Pensylvania*, *supra*, pp. 335–336, was explained in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 256, which was decided in 1938. The Court stated that the latter type of tax could be imposed or added to "with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. . . . The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove." This explanation of the vice of the unapportioned gross receipts tax had been earlier suggested in *Case of the State Freight Tax*, 15 Wall. 232, 280, and has been accepted by our decisions since the *Western Live Stock* case. *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438–440; *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 45–46. In both *Adams Mfg. Co.* v. *Storen*, *supra*, and *Gwin, White & Prince Inc.* v. *Henneford*, *supra*, unapportioned gross receipts taxes as applied to the receipts from interstate sales were held invalid. It was said that the vice of such a tax was that interstate commerce

would be subjected "to the risk of a double tax burden to which intrastate commerce is not exposed. . . ." *Adams Mfg. Co.* v. *Storen*, *supra*, p. 311. Or as stated in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*, p. 439:

> "Here the tax, measured by the entire volume of the interstate commerce in which appellant participates, is not apportioned to its activities within the state. If Washington is free to exact such a tax, other states to which the commerce extends may, with equal right, lay a tax similarly measured for the privilege of conducting within their respective territorial limits the activities there which contribute to the service. The present tax, though nominally local, thus in its practical operation discriminates against interstate commerce, since it imposes upon it, merely because interstate commerce is being done, the risk of a multiple burden to which local commerce is not exposed."

As was later stated in *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167, 175, as respects taxes on gross receipts from interstate transactions or interstate transportation, "The measurement of a tax by gross receipts where it cannot result in a multiplication of the levies is upheld."

Under that view the *Philadelphia & Southern S. Co.* case would be decided one way and the *Puget Sound Stevedoring Co.* case the other. As we have noted, the tax in the *Philadelphia & Southern S. Co.* case was a gross receipts tax on fares and freight for the transportation of persons and goods in interstate and foreign commerce. It was unapportioned. And there was the risk of multiple taxation to which local transportation, though also taxed, was not subjected. The same was true of *Ratterman* v. *Western Union Tel. Co.*, 127 U. S. 411; *Western Union Telegraph Co.* v. *Alabama*, 132 U. S. 472; and *Meyer* v. *Wells, Fargo & Co.*, 223 U. S. 298.

But in the *Puget Sound* case any risk of multiple taxation was absent. The same is true of the present case.

For in each the activity of loading and unloading was confined exclusively to the State that imposed the tax. No other State could tax the same activity.[3] The tax therefore is in its application nothing more than a gross receipts tax apportioned to reach only income derived from activities within the taxing State. The gross receipts reflect values attributable to the business or property wholly within the taxing state. Under the test of our recent decisions (*Western Live Stock* v. *Bureau of Revenue, supra; Adams Mfg. Co.* v. *Storen, supra; Gwin, White & Prince, Inc.* v. *Henneford, supra*), the tax would therefore seem to be unobjectionable.

It is true, however, that taxes on gross receipts of transportation companies and other interstate enterprises were held invalid in cases prior to the *Puget Sound* case, even though all of the activities were confined to the taxing state and could not be taxed by any other state. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, 210 U. S. 217; *New Jersey Bell Tel. Co.* v. *State Board*, 280 U. S. 338. Cf. *Fargo* v. *Michigan*, 121 U. S. 230. The explanation given in the *Galveston* case was that a tax on the gross receipts was a regulation of commerce, as the *Philadelphia & Southern S. Co.* case held. It distinguished *Maine* v. *Grand Trunk Ry. Co., supra*, and the other apportionment cases on the ground that they involved taxes on property, the gross receipts being taken as the measure of the value of the property. The Court said (210 U. S., p. 227):

[3] The Court suggests that the fact that similar stevedoring activity will be required at the destination creates a risk of multiple taxation, since the State of destination would be as free to tax the unloading as New York to tax the loading. This is only multiple in the sense that each State taxes what occurs within its borders; the two taxes would not be on the same activity. It is no more relevant that stevedoring is involved in both cases, than is the fact that two States may impose property taxes on terminals or trackage within their respective borders.

"It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the States so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

The *Galveston* case, like the *Philadelphia & Southern S. Co.* case, involved a tax applicable to transportation companies alone.[4] Whatever may be said for the proposition that a gross receipts tax, applicable only to transportation companies, may readily become the instrument

[4] Moreover, the tax in the *Philadelphia & Southern S. Co.* case was restricted not only to transportation companies but also to receipts from transportation. Those facts were emphasized by Mr. Justice Bradley (122 U. S. pp. 344–345): "Can the tax in this case be regarded as an income tax? and, if it can, does that make any difference as to its constitutionality? We do not think that it can properly be regarded as an income tax. It is not a general tax on the incomes of all the inhabitants of the state; but a special tax on transportation companies. Conceding, however, that an income tax may be imposed on certain classes of the community, distinguished by the character of their occupations; this is not an income tax on the class to which

for impeding or destroying interstate commerce, that consideration has no relevancy here. For in the present case, as in the *Puget Sound* case, all businesses are taxed alike. There is equality throughout; and interstate commerce is taxed no heavier than local business. Political restraints, perhaps lacking when a particular type of business is singled out for special taxation, would not be absent here.

Moreover, the difference between a tax on property measured by gross receipts and a tax on the gross receipts does not appear significant in constitutional terms when the issue is one of undue burden on interstate commerce. Either might be an instrument to that end. The apportioned gross receipts tax in *Maine* v. *Grand Trunk Ry. Co.*, *supra*, was in terms "an annual excise tax for the privilege of exercising" the corporation's franchises in the State. 142 U. S. p. 219. The Court stated, p. 228, "a resort to those receipts was simply to ascertain the value of the business done by the corporation, and thus obtain a guide to a reasonable conclusion as to the amount of the excise tax which should be levied. . . ." As much can be said of the present case and of the *Puget Sound* case. While the tax is in terms one on the privilege of doing

---

it refers, but a tax on their receipts for transportation only. Many of the companies included in it may, and undoubtedly do, have incomes from other sources, such as rents of houses, wharves, stores, and water-power, and interest on moneyed investments. As a tax on transportation, we have already seen from the quotations from the *State Freight Tax Case* that it cannot be supported where that transportation is an ingredient of interstate or foreign commerce, even though the law imposing the tax be expressed in such general terms as to include receipts from transportation which are properly taxable. It is unnecessary, therefore, to discuss the question which would arise if the tax were properly a tax on income. It is clearly not such, but a tax on transportation only." Cf. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, which sustained as against an interstate enterprise a net income tax of general application.

business, resort is made to the gross receipts merely to ascertain the value of the business. No vice of extra-territoriality or multiple taxation is involved. The value taxed is attributable to business within the taxing State and may not be reached by any other State. That value is, of course, augmented by the interstate character of the business. But the same is true in any apportionment case. *Galveston, Harrisburg & S. A. Ry. Co.* v. *Texas*, *supra*, p. 225; *Cudahy Packing Co.* v. *Minnesota*, *supra*, pp. 455–456.

Respondents pay other taxes to New York City, including the usual property taxes. But so long as a tax does not discriminate against interstate commerce and is fairly apportioned to the activities in the taxing state, taxing the business twice is for constitutional purposes no different than doubling a single tax. If the whole scheme of taxation adopted by a particular State were taken into account, it might be that a case of discrimination against interstate commerce could be made out. But there is no suggestion that this is such a case. Nor can we say that the system which has been adopted here bids fair to be more harmful to interstate commerce than a system designed to raise the same amount of revenue by the use of a gross receipts tax in lieu of property taxes.

Moreover, as noted in *Gwin, White & Prince, Inc.* v. *Henneford*, *supra*, p. 438, and in *Adams Mfg. Co.* v. *Storen*, *supra*, pp. 312–313, there have been other cases sustaining a gross receipts tax on interstate enterprises where the gross receipts tax fairly measured the value of a local privilege or franchise and all risk of multiple taxation was absent. *Ficklen* v. *Shelby Co. Taxing District*, 145 U. S. 1, upheld a state license tax imposed upon the privilege of doing a brokerage business within the State and measured by the gross receipts from sales of merchandise shipped into the State for delivery after sales were made. *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459, upheld

a municipal license tax on the gross receipts of a manufacturer who was producing goods for interstate commerce. The tax was sustained as an excise upon the conduct of a manufacturing enterprise. Those taxes, like property taxes or taxes on activities confined solely to the taxing state (*New York, Lake Erie & W. R. Co.* v. *Pennsylvania*, 158 U. S. 431; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165; *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U. S. 604) have no cumulative effect caused by the interstate character of the business. They are apportioned to the activities taxed, all of which are intrastate. Plainly the loading and unloading involved in the present case are activities as local in character as the brokerage activities in the *Fisklen* case or the manufacturing business in the *American Mfg. Co.* case. One has as close and as immediate a relationship to interstate commerce as the other. Cf. *United States* v. *Darby*, 312 U. S. 100. If one gives rise to a taxable event for which the State may exact a portion of the gross receipts, it is difficult to see why the other does not. The practical effect on interstate commerce is the same in each.

In *McGoldrick* v. *Berwind-White Co.*, *supra*, p. 52, we held that a sales tax on the purchase of property at the end of its interstate journey was not to be distinguished from a tax on the property itself. For taxation of the sale was merely taxation of the exercise of one of the constituent elements of the property. Unless formal doctrine is to be restored to this field, the label which the tax bears should not be controlling; and the tax should be sustained unless it evinces hostility to interstate commerce or in practical operation obstructs or impedes it. Either result may obtain whether the tax be called a property tax or a gross receipts tax. As *McGoldrick* v. *Berwind-White Co.*, *supra*, p. 48, states:

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or de-

stroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

Measured by that test the present tax is not invalid. "Even interstate business must pay its way. . . ." *Postal Telegraph-Cable Co. v. Richmond*, 249 U. S. 252, 259. A non-discriminatory gross receipts tax, apportioned to local activity in the taxing state, is to be judged by its practical effect. As we stated in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444:

"The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly civilized society."

All local taxes on interstate businesses affect to some degree the commerce and increase the cost of doing it. Matters of form should not be decisive if the tax threatens no harm to interstate commerce.

Prior to *McGoldrick* v. *Berwind-White Co.*, *supra*, it had long been said that "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." *Robbins* v. *Shelby Co. Taxing District*, 120 U. S. 489, 497. That was the philosophy of the *Philadelphia & Southern S. Co.* case. And see *Fargo* v. *Michigan*, *supra*, pp. 246–247. But *McGoldrick* v. *Berwind-White Co.*, *supra*, did not adhere to that formal doctrine. It followed *Wisconsin Corp.* v. *Pennsylvania*, 294 U. S. 169, and upheld a "non-discriminatory tax on the sale to a buyer within the taxing state of a commodity shipped interstate in performance of the sales contract, not upon the ground that the delivery was not a part of interstate commerce . . . but because the tax was not a prohibited regulation of, or burden on, that commerce." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U. S. 498, 505. The test adopted was whether the tax on the local activity as a practical matter was being used to place interstate commerce at a competitive disadvantage or obstruct or impede it. That should be the approach here; "the logic of words should yield to the logic of realities." Mr. Justice Brandeis dissenting, *Di Santo* v. *Pennsylvania*, 273 U. S. 34, 43. The failure of the Court to adhere to the philosophy of our recent cases corroborates the impression which some of us had that *Freeman* v. *Hewit*, 329 U. S. —, marked the end of one cycle under the Commerce Clause and the beginning of another.

Second, I think the tax is unconstitutional insofar as it reaches the gross receipts from loading and unloading vessels engaged in foreign commerce. Such a tax is repugnant to Article I, § 10, Clause 2 of the Constitution which provides that "No State shall, without the Consent of the

Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws. . . ."

Loading and unloading are a part of "the exporting process" which the Import-Export Clause protects from state taxation. See *Thames & Mersey Ins. Co. v. United States*, 237 U. S. 19, 27. Activity which is a "step in exportation" has that immunity. *Spalding & Bros.* v. *Edwards*, 262 U. S. 66, 68. As the Court says, loading and unloading cargo are "a continuation of the transportation." Indeed, the commencement of exportation would occur no later. See *Richfield Oil Corp.* v. *State Board*, 329 U. S. —. And the gross receipts tax is an impost on an export within the meaning of the Clause, since the incident "which gave rise to the accrual of the tax was a step in the export process." *Richfield Oil Corp.* v. *State Board, supra*, p. —.

As we pointed out in that case, the Commerce Clause and the Import-Export Clause "though complementary, serve different ends." 329 U. S. p. —. Since the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. Taxes designed to make interstate commerce bear a fair share of the cost of local government from which it receives benefits have been upheld; taxes which discriminate against interstate commerce, which impose a levy for the privilege of doing it, or which place an undue burden on it have been invalidated. But the Import-Export Clause is written in terms which admit of no exception but the single one it contains. Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example.

MR. JUSTICE MURPHY joins in this dissent except as to the second part, as to which he is of the opinion that the tax in relation to the gross receipts from loading and unloading vessels engaged in foreign commerce is constitutional.